SUSAN GRODY RUBEN, Esq.
Labor Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124

IN ARBITRATION PROCEEDINGS PURSUANT TO THE

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME Local 11 AFL-CIO** **and** **OHIO DEPARTMENT OF REHABILITATION AND CORRECTION** **Case No. 27-33-20090323-0032-01-03** **Grievant: Chris George**	**ARBITRATOR'S OPINION AND AWARD**

This Arbitration arises pursuant to collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State" or "DRC"), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator, whose decision shall be final and binding pursuant to the Agreement.

The Parties agreed to waive an oral hearing. The record consists of a stipulated issue, joint exhibits, and Party exhibits. Both Parties submitted written briefs.

APPEARANCES:

On behalf of the Union:

TOM COCHRANE, Esq., OCSEA , Columbus, Ohio.

On behalf of the State:

ASHLEY HUGHES, Esq., OCB, Columbus, Ohio.

STIPULATED ISSUE

Does the Department Rehabilitation and Correction's FMLA Policy violate Section 31.06 of the Agreement by requiring employees to exhaust all compensatory time balances before taking unpaid leave under the FMLA?

RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT
March 1, 2006 – February 28, 2009

. . .

ARTICLE 13 – WORK WEEK, SCHEDULES AND OVERTIME

…

13.10 – Payment for Overtime

…

Compensatory Time

The employee may elect to accrue compensatory time off in lieu of cash overtime payment for hours in an active pay status more than forty (40) hours worked in any calendar week. Compensatory time off will be earned on a time and one-half (1 ½) basis. The maximum accrual of compensatory time shall be two hundred forty (240) hours. When the maximum hours of compensatory time accrual is attained, payment for overtime work shall be made. Compensatory time must be used within two hundred seventy (270) days from when it was earned. Compensatory time not used within two hundred seventy (270) days shall be paid to the employee at the employee's current regular rate of pay. Any employee who has accrued compensatory time off and requests use of this compensatory time shall be permitted to use such time off within a reasonable period after making the request or, if such use is denied, the compensatory time requested shall be paid to the employee at his/her option to a maximum of eighty (80) hours in any pay period. Compensatory time is not available for use until it appears on the employee's earnings statement and on the date the funds are made available.

…

…

. . .

ARTICLE 31 – LEAVES OF ABSENCE

…

31.06 – Application of the Family and Medical Leave Act

The Employer will comply with all provisions of the Family and Medical Leave Act (FMLA). For any leave which qualifies under the FMLA, the employee may be required to exhaust all applicable paid leave prior to the approval of unpaid leave.

. . .

STIPULATED FACTS

1. **The Grievance is properly before the Arbitrator. There are no procedural objections.**

2. **The Department of Labor's new FMLA regulations went into effect January 16, 2009.**

3. **DRC's FMLA Policy (36-LEV-02) went into effect January 29, 2009.**

4. **The January 29, 2009 revisions to DRC's FMLA policy were due to the implementation of the new Department of Labor regulations.**

5. **Prior to January 16, 2009, the FMLA regulations (29 CFR 825.207) did not permit public employers to require employees to exhaust compensatory time balances concurrently with FMLA leave.**

PARTIES' POSITIONS

Union Position

Prior to issuing its new FMLA policy on January 29, 2009, DRC did not require employees to use compensatory time concurrently with FMLA leave because public employers were barred from requiring concurrent use. 29 CFR § 825.207. The regulations were amended January 16, 2009. The pertinent section was changed to read in pertinent part:

> **…if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA,**

> **the time taken may be counted against the employee's FMLA leave entitlement.**

29 CFR § 825.207(f). As a result of this change, DAS changed its master FMLA policy, and DRC, in turn, changed its agency policy. DRC's policy now includes the following provision:

> **Employees must exhaust all sick, personal and vacation and compensatory (in whatever order they choose) leave balances before taking unpaid leave under the FMLA. For payroll purposes, if any personal, compensatory and/or vacation time is used, it shall be coded as "in lieu of sick." However, if no designation is made, the leave will be automatically deducted in the following order: (1) sick; (2) compensatory, (3) personal and (4) vacation. Any paid leave will run concurrently with FMLA leave.**

36-LEV-02, § VI(D)(1).

The Union filed the instant grievance on March 23, 2009, alleging Section VI(D)(1) violates the Agreement. Compelling employees to use compensatory time without their assent violates Section 31.06, which did not change when the FMLA regulations were amended. The Parties had a bargain governing how compensatory time and the FMLA would be handled. 36-LEV-02 impermissibly changed the terms of that bargain.

Compensatory time is referenced 48 times in the Agreement. On each occasion where its accrual, use, or payout is discussed, control of leave is vested in the employee, or in both the employee and employer. No aspect of compensatory time is subject to the employer's exclusive control.

Section 13.10 states only the employee may determine if he or she will accrue compensatory time, and only the employee may determine when and if it will be used. The employer has only a limited right to refuse the employee's requested use of compensatory time. DRC cannot stop an employee from taking compensatory time off when he or she wants; it has only the right to delay the time off; the employee still has the right to take the time off within a reasonable period.

The employee's right to take payout in lieu of compensatory time if his or her first time off request is denied is not subject to any limitations. 36-LEV-02 violates the Agreement because it places a unilateral limitation on these benefits. Section 31.06 brings the FMLA into the Agreement, but it does not give DRC the power to sweep aside an employee benefit like the right to control their use of compensatory time.

In Grand Haven Stamped Products, 107 LA 131 (Daniel, 1996), the arbitrator held a post-FMLA unilaterally-enacted limitation on vacation scheduling – employees were now required to exhaust their vacation before taking unpaid FMLA leave – improperly limited the employees' bargained-for right to vacation: "The right of the employer under the FMLA to exercise an option requiring employees to use…accrued vacation time is limited by the collective bargaining agreement which, in this case, does not permit the employer to diminish the beneficial value of vacation choice." Id. at 138. Arbitrator Chattman held similarly in Union Hospital, 108 LA 966 (1997):

> **Notably, nowhere in the CBA does the employer retain any managerial right to require employees to substitute their accrued paid time in such circumstances.**
>
> **The arbitrator finds that the language in the CBA on the issue of applying paid time to unpaid leave is clear: employees have been given the exclusive right to elect paid time. Certainly, the ability to choose paid leave is a benefit to the employee. By not applying one's accrued paid time when taking a leave of absence, the employee retains the right to take additional leave later in the year: also a benefit. Conversely, when the employee forfeits paid vacation time during a sick leave, that individual loses the ability to take the vacation days off. There is no doubt that an employee has obtained greater FMLA rights in the event that s/he retains the ability to determine whether to substitute accrued paid time during an unpaid leave.**

Id. at 973.

Although the instant case concerns compensatory time, not vacation, the reasoning in Grand Haven Stamped Products and Union Hospital applies with

equal force. 36-LEV-02 effectively amends the Agreement to place a substantial limitation on employees' right to use their compensatory time. DRC does not have the unilateral right to make such a change in the Agreement.

Moreover, Section 31.06 states the employer may require exhaustion of only certain kinds of leave, and compensatory time is not one of those: "For any leave which qualifies under the FMLA, the employee may be required to exhaust all applicable paid leave prior to the approval of unpaid leave." The provision does not permit DRC to require employees to exhaust all paid leave prior to taking unpaid FMLA, only "applicable" leave. As used in the sentence, applicable means "applicable to the circumstances giving rise to the employee's need for leave."

Sick leave is an applicable leave for which exhaustion may be required, because the circumstances giving rise to the employee's need for FMLA usually qualify as reasons justifying the use of sick leave also. Similarly, the birth of a child, care of a newborn, care of a child, spouse, or parent with a serious health condition may occasion FMLA leave.

Although FMLA and sick leave substantially overlap, they are not coextensive. Pregnancy, for example, is always a serious health condition that would qualify for FMLA, but it would not qualify for sick leave. Thus, an employee on FMLA due to pregnancy cannot be compelled to take sick leave because sick leave is not "applicable" to pregnancy.

In the same way sick leave is not applicable to certain FMLA situations, compensatory leave also is not applicable. Compensatory leave is an accrued benefit the employee may avail herself of in a wide range of circumstances, few of which qualify for FMLA leave. Compensatory time can be used simply to provide time off over and above accrued vacation. This is not applicable to FMLA.

Only two situations could possibly overlap with FMLA. Employees who have exhausted sick leave may supplement disability leave or workers

compensation leave with compensatory leave. A health condition that qualifies for disability leave or workers compensation leave likely would qualify as a serious health condition under the FMLA. Similarly, the same can be said for adoption/childbirth leave, but only to the extent the leave is being taken for purposes of bonding with the child.

There is another critical distinction between sick leave and compensatory time. Sick leave is triggered automatically when certain preconditions are met. Compensatory time is triggered only at the option of the employee, or, in limited situations, when mutually agreed upon by the employee and DRC.

FMLA Section 402 provides in pertinent part:

> **(a) …Nothing in this Act or any amendment made by the Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement….**

It cannot be doubted "the elimination of an employee's personal choice over whether to use accrued paid leave concurrently with FMLA leave is a diminishment of contractual rights within the meaning" of the FMLA. City and County of San Francisco, 119 LA 596, 600 (Silver, 2004). The FMLA "was not intended, and expressly states, [it] does not supersede any of the Employer's contractual obligations." Dura Convertible Systems, 119 LA at 1706.

DRC's implementation of 36-LEV-02 diminishes the rights of employees to use compensatory time as they choose. They have already bargained for the right to earn, take, and be paid for compensatory time under prescribed circumstances. The FMLA does not give DRC the power to change the terms of that bargain. See Bhd. of Maint. of Way Employees v. CSX Transp., Inc., 478 F.3d 814, 820 (7th Cir. 2007): "…the FMLA does not allow the carriers to violate contractual obligations protected by the RLA regarding paid vacation and personal leave time." See also, Verizon North, Inc., 352 NLRB 1022, 1025 (2008) (employer not permitted to

unilaterally implement a policy requiring substitution of vacation and personal leave for unpaid leave).

The FLSA does not provide authority for an employer to impose a compensatory time policy on its employees when those employees are represented by a union. The regulation on which DRC relies, 29 CFR § 825.207(f), applies only to employees not covered by a collective bargaining agreement. The regulation was made in reliance upon Christensen v. Harris County, 529 US 576 (2000):

> **[W]e decide this case on the assumption that no agreement or understanding exists between the employer and employees on the issue of compelled use of compensatory time.**

Id. at 582 n.3. The Christensen holding did not change the requirement that in collective bargaining settings, the accrual, use, and payout of compensatory time is governed by the applicable collective bargaining agreement. See Saunders v. City of New York, 594 F.Supp. 2d 346, 361 n.102 (SDNY 2008):

> **To support their claim that agreements with individual employees are valid under the FLSA, defendants point to a footnote in Christensen….Defendants fail to note that the Court was addressing employees without a bargaining representative.**

State Position

Prior to the January 16, 2009 revisions, the FMLA regulations prohibited substitution of accrued compensatory time for unpaid FMLA leave. The January amendments removed the prohibition against substitution of accrued compensatory time for unpaid FMLA leave. Due to the change in the FMLA regulations, DAS revised the statewide FMLA policy effective January 23, 2009. DRC revised its agency policy effective January 29, 2009. Both DAS and DRC's policy revision included the requirement that employees exhaust all compensatory balances before taking unpaid FMLA leave.

29 CFR § 825.207(f) provides in pertinent part:

> **…under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.**

The Union argues this regulation does not allow the State to require employees to exhaust compensatory time balances because the State does not require such use under the FLSA. The Union's reading of the regulation is flawed. The Union interpretation is an employer can require employees to substitute compensatory time for unpaid FMLA time only if the employer's compensatory time policies require employees to use compensatory time. But the regulation merely is stating the employer is allowed to require the substitution pursuant to Christensen v. Harris County, 529 U.S. 576 (2000). The Court ruled public sector employers can compel their employees to use their accrued compensatory time. Thus, the regulation states employers can require employees to substitute compensatory time for unpaid FMLA leave because such compulsion of use is authorized by the FLSA under the rule established in Christensen.

Arguendo, even if the Union's interpretation is correct, the Union's argument falls short because the State does compel employees to use their accrued compensatory time. Article 13.10 of the Agreement states "[c]ompensatory time must be used within three hundred sixty-five (365) calendar days from when it was earned." Article 13.10 also states if an employee does not use accrued compensatory time within the mandated 365 days, the compensatory time will be cashed out. This cashout can be considered constructive use of compensatory time. OAC 123:1-43-02(E) also requires employees to use all compensatory time prior to being granted an unpaid leave, except as otherwise permitted under state or federal law.

The regulation permits public employers to require compensatory time substitution for unpaid FMLA leave; it does not hinge upon whether public employers require employees to use their compensatory time. In commentary on the proposed FMLA regulations, the Department of Labor stated:

> **…in proposed § 825.207(f) the Department proposed to revise current § 825.207(i) to allow the substitution of compensatory time accrued by public agency employees under the [FLSA] for unpaid FMLA leave. The Department believes that the proposed revision is not prohibited by the Act and is consistent with the United States Supreme Court's decision in Christensen, in which the Court found that public employers always have the right to cash out a public sector employee's compensatory time or require the employee to use the time….**

Additionally, the overwhelming majority of legal and human resource professionals interpret 29 CFR § 825.207(f) as authorizing the public employer to require compensatory time substitution for unpaid FMLA leave regardless of whether the employer's compensatory time policies determine when compensatory time must be used.

Article 31.06 of the Agreement expressly allows the State to require employees to exhaust compensatory time balances before taking unpaid FMLA leave:

> **The Employer will comply with all provisions of the Family and Medical Leave Act (FMLA). For any leave which qualifies under the FMLA, the employee may be required to exhaust all applicable paid leave prior to the approval of unpaid leave.**

The amended FMLA regulations provide compensatory time is now a type of applicable paid leave under the FMLA which the employee may be required to exhaust prior to the approval of unpaid leave.

The Union may argue Article 13.10 gives bargaining unit employees the final say on the use and application of accrued compensatory time. The Union would argue the DRC's amended FMLA policy is a unilateral decision by the State regarding the use of compensatory time and thus violates the Agreement. This argument is without merit.

When there is a conflict between general contract language and specific contract language, the specific language will govern. Elkouri (6th ed.) at p. 470. Article 13.10 speaks to the use of compensatory time, but Article 31.06 is more specific. Article 31.06 is titled "Application of the Family and Medical Leave Act"; it articulates the State may require employees to exhaust all applicable paid leave under the FMLA prior to the approval of unpaid leave. Because Article 31.06 is more specific in terms of compulsion of use of paid leave under the FMLA, Article 31.06 governs.

The DRC FMLA policy requires employees to exhaust all compensatory time balances prior to taking unpaid leave under the FMLA. Under the 2009 FMLA amended regulations, compensatory time is now an applicable paid leave that can be substituted under the FMLA. Consequently, the DRC FMLA policy does not violate Article 31.06 of the Agreement.

OPINION

This is a matter of contract interpretation. Accordingly, the Union has the burden of proof. The resolution of the grievance boils down to two intertwined questions: (1) whether 29 CFR § 825.207 (2009) permits the State to unilaterally amend 36-LEV-02 (2009); and (2) whether the reference in Article 31.06 of the Agreement to "applicable" paid leave includes banked compensatory time.

1. **Whether 29 CFR § 825.207 permits the State to unilaterally amend 36-LEV-02**

The U.S. Department of Labor amended its FMLA regulations in January 2009 to permit public employers to require employees to exhaust banked

compensatory leave as part of an FMLA leave. 29 CFR § 825.207 (2009). The new regulation does not require public employers to adopt this rule.[1]

The State relies on the following language in the new regulation for the proposition it had the right to unilaterally change DRC 36-LEV-02:

> **…under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time.**

29 CFR § 825.207(f). The DOL based that language, however, on Christensen v. Harris County, 529 U.S. 576 (2000); the DOL explained:

> **The Department believes that the proposed revision is not prohibited by the Act and is consistent with the United States Supreme Court's decision in Christensen, in which the Court found that public employers always have the right to cash out a public sector employee's compensatory time or require the employee to use the time.**

73 Fed. Reg. 67983. And as the Christensen Court itself pointed out:

> **[W] decide this case on the assumption that no agreement or understanding exists between the employer and employees on the issue of compelled use of compensatory time.**

529 U.S. at 582 n.3.[2]

In the instant situation, there obviously is a collective bargaining agreement. Indeed, the existence of the compensatory time earned by these employees comes from the Agreement, as the FLSA provides in pertinent part:

> **[29 U.S.C. § 207] (o) Compensatory time**
> **(1) Employees of a public agency which is a State…may receive…compensatory time off….**
> **(2) A public agency may provide compensatory time under paragraph (1) only –**
> **(A) pursuant to –**
> **(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees….**

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[1] **"…if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement." 29 CFR § 825.207(f) (2009) (emphasis added).**

[2] **See also, Saunders v. City of New York, 594 F.Supp.2d 346, 361 n.102 (SDNY 2008): "[I]n Christensen…the Court was addressing employees without a bargaining representative."**

Further, the FMLA itself provides it does not supersede a collective bargaining agreement:

> **…Nothing in this Act or any amendment made by the Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement….**

Section 402(a). Accordingly, based on the above analysis, there is nothing in the FMLA, 29 CFR § 825.207, or the FLSA that gives the State the right to unilaterally amend 36-LEV-02. Thus, the analysis turns to the contractual question – i.e., whether the amended 36-LEV-02 violates Article 31.06.

2. **<u>Whether the reference in Article 31.06 to "applicable" paid leave includes banked compensatory time</u>**

If the "applicable paid leave" referred to in Article 31.06 already covers banked compensatory time, the State did not violate that Article of the Agreement when it amended 36-LEV-02. The question centers on the meaning of "applicable" in this context.

If Article 31.06 did not include the word "applicable," – i.e., if the Agreement stated, "For any leave which qualifies under the FMLA, the employee may be required to exhaust <u>all paid leave</u> prior to the approval of unpaid leave" – the grievance would be denied because banked compensatory time can reasonably be construed as being in the category of "all paid leave." Article 31.06, however, provides in pertinent part:

> **For any leave <u>which qualifies under the FMLA</u>, the employee may be required to exhaust <u>all applicable paid leave</u> prior to the approval of unpaid leave.**

(Emphasis added.)

Words in a collective bargaining agreement each have meaning. Thus, in Article 31.06, "applicable" means something. The way the sentence is constructed, the only reasonable interpretation of "applicable" is that it relates back to "any leave which qualifies under the FMLA." Time taken using banked

compensatory time is not a "leave which qualifies under the FMLA." Rather, compensatory time off is in lieu of wages for overtime. Compensatory time off is not a medical leave or a caretaking leave, i.e., a leave that "qualifies under the FMLA."[3] Accordingly, because compensatory time off is not a "leave which qualifies under the FMLA," it is not "applicable paid leave" within the meaning of Article 31.06.

Moreover, given that when the Agreement was negotiated, the FMLA did not permit the State to require exhaustion of compensatory time, it cannot be said the Parties intended compensatory time to be included in the "applicable paid leave[s]" referred to in Article 31.06. The Arbitrator's task is to determine to the extent possible the Parties' intended meaning of the contract language in dispute. Here, the language was negotiated before the State had the right to require exhaustion of compensatory time. Thus, the State could not have intended for the "applicable paid leave[s]" in Article 31.06 to include compensatory time.

AWARD

For the reasons set out above, the grievance is granted. The State is hereby ordered to rescind the references to compensatory time in amended DRC policy 36-LEV-02, §VI(D)(1).

The Arbitrator shall maintain jurisdiction for 60 calendar days from the date of this Award with regard to remedy only.

Dated: August 11, 2010

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator

[3] Certainly, if an employee chooses to substitute banked compensatory time for unpaid FMLA leave, the compensatory time becomes temporarily linked to FMLA leave. However, the intrinsic nature of compensatory time – i.e., time off in lieu of overtime pay – has no substantive link to the reasons an employee would be on FMLA leave.