**OCB AWARD NUMBER: 2088**

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| **SUBJECT:** | **ARB SUMMARY # 2088** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **KRISTEN RANKIN** |
| **OCB GRIEVANCE NUMBER:** | **27-33-20090323-0032-01-03** |
| **DEPARTMENT:** | Ohio Department of Rehabilitation and Correction |
| **UNION:** | OCSEA |
| **ARBITRATOR:** | Susan Grody Ruben |
| **GRIEVANT NAME:** | Chris George |
| **MANAGEMENT ADVOCATE:** | Ashley Hughes |
| **2ND CHAIR:** | N/A |
| **UNION ADVOCATE:** | Tom Cochrane |
| **ARBITRATION DATE:** | By Brief, May 5, 2010 |
| **DECISION DATE:** | August 11, 2010 |
| **DECISION:** | GRANTED |
| **CONTRACT SECTIONS:** | Article 31 |
| **OCB RESEARCH CODES:** | 116.2001—FMLA Issues; 115.5011 Compensatory Time; 54.652 Contract Interpretation in General. |
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**HOLDING: Grievance GRANTED. The Arbitrator found that the regulation does not require public employers to adopt rule 29 CFR § 825.207** **and that compensatory time off is not “applicable paid leave” within the meaning of Article 31.06.**

The Department of Labor’s new FMLA regulations went into effect January 16, 2009. After the new FMLA regulations took effect, the Department of Rehabilitation and Correction (DRC) amended the agency FMLA policy to require employees to exhaust all compensatory time balances before taking unpaid leave under the FMLA. DRC’s FMLA Policy (36-LEV-02) went into effect January 29, 2009. The January 29, 2009 revisions to DRC’s FMLA policy were due to the implementation of the new Department of Labor regulations. 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.

The Union arguedthat prior to DRC 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. The Union argued that compelling employees to use compensatory time off without their consent violated Section 31.06 of the collective bargaining agreement (CBA), which did not change when the FMLA regulations were amended. No aspect of compensatory time is subject to the employer’s exclusive control. The Union argued that DRC’s policy effectively amended the CBA to place a substantial limitation on employees’ right to use their compensatory time and DRC did not have the unilateral right to make such a change in the Agreement. The Union also argued that compensatory leave is not applicable to FMLA. 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. 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. The Union claimed that DRC did not have the right to change the terms of the contractual agreement unilaterally nor did the FLSA or FMLA give the provide the authority to the Employer to impose the policy changes.

The Employer arguedthat 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. The Union’s reading of the regulation is flawed. The Court in Christensen v. Harris County, 529 U.S. 576 (2000), held that public sector employers can compel their employees to use their accrued compensatory time. 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. 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 amended FMLA regulations provide that 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. Therefore, the DRC FMLA policy does not violate Article 31.06 of the Agreement.

The Arbitrator held that the new FMLA regulations permits the Employer to adopt the rule but does not require the Employer to do so. This point, coupled with the fact that the FMLA did not supersede the CBA, lead the Arbitrator to determine that the Employer could not unilaterally amend the CBA and in turn DRC’s policy. The Arbitrator ultimately concluded that the updated policy violated Article 31.06 of the CBA. The Arbitrator held that compensatory time was not included in the meaning of “applicable paid leave” as written in Article 31.06. The Arbitrator determined that “applicable paid leave” only includes leave which qualifies under the FMLA which did not include compensatory time. Rather, compensatory time off is in lieu of wages for overtime. Compensatory time off is not “applicable paid leave” within the meaning of Article 31.06. When the Agreement was negotiated the FMLA did not permit the State to require exhaustion of compensatory time. Thus, the State could not have intended for the “applicable paid leaves” in Article 31.06 to include compensatory time and therefore, the Arbitrator **granted** the grievance.