

## COLLECTIVE BARGAINING CLARIFICATION LETTER

NO. 12-09-01

To: All Labor Relations Officers and Personnel Officers  
From: Michael Duco, Deputy Director  
Date: September 24, 2012  
Subject: **GRANTING PERSONAL LEAVE PER THE OCSEA CONTRACT**

This clarification letter replaces clarification letter No. 07-06-03.

**While the 1995 MOU regarding the approval of personal leave expired with the end of the 1994-1997 Agreement, the parties are guided by the arbitration decisions of Arbitrator Mollie Bowers and Arbitrator Anna DuVal Smith. This letter contains instructions revised in light of modifications to the Agreement made during the negotiation of the 2006-2009 Agreement.**

### HISTORY

Article §27.04 of the OCSEA Agreement states in pertinent part, “Personal leave shall be granted if an employee makes the request with a forty-eight (48) hour notice.” This concept was originally negotiated during the bargaining of the first statewide contract between the State and OCSEA. In the 1996-1997 negotiations the provision was changed from a “one day notice” to the forty-eight hour notice. The State has attempted to gain some relief from the “shall” provision in every round of bargaining since the first. During the 1989 negotiations, language was added to Article §13.02, which states “It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time.” Again, during the 1992 negotiations the language was changed in §13.02 to read as follows, “[I]t is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time, including persons on leave (excluding disability leave).”. During the 1994 negotiations, the State again attempted to gain a change by proposing that the “shall” in §27.04 be changed to “may”. The State was unsuccessful.

Additionally, the State has argued in two arbitrations that “shall” does not always mean “shall.” The first arbitration involved an interpretation of the 1986 language and the State did not prevail. That decision provided an interpretation which made it impossible to deny such requests. The second arbitration decision resulted in an interpretation of the 1989 Agreement. Again, the State did not prevail; however, the State did fare better in the interpretation. In 1992, Arbitrator Mollie Bowers established that after the Employer has looked at several alternatives to ensure adequate staffing, if the requisite number of staff remain unavailable, then the Employer may deny requests for the use of personal leave. Therefore, while it is possible to deny a request for personal leave, the standard for doing so is very difficult and agencies are advised to consider that the “shall” provision does in fact mean “shall” in almost every case. (See Arbitration Award #828.)

After a protracted and careful analysis OCB concluded that it was highly unlikely that the State would prevail in arbitrating grievances regarding the interpretation of the language modified from the 1992 negotiations. The only difference between the 1989 language and the 1992 language is the phrase, “including persons on leave (excluding disability leave)” in §13.02. Arbitrator Bowers

rejected the State’s argument that the language of §13.02 was intended to modify the “shall” in §27.04. The Union argued and continues to argue that additional language serves only as a modifier of the 1989 language rather than as a distinct piece of language broadening the original intent of §13.02.

Based on the above, on June 27, 1995, the State entered into a Memorandum of Understanding with OCSEA, regarding future actions for approving requests for personal leave from OCSEA members. **The Memorandum of Understanding expired with the Collective Bargaining Agreement, which expired at midnight on February 27, 1997.**

Arbitrator Anna DuVal Smith, in Award No. 1882, gave further interpretation to §27.04. Arbitrator Smith decided that the language is clear—employers must grant personal leave if it has been properly requested. Further, “...if the application of the mandatory personal leave benefit brings staffing level below the minimum required by law or management policy, it is Management’s responsibility to find a way – using discretion provided elsewhere in the Contract or other lawful means if necessary – to achieve its goal without breaking its bargain with OCSEA...”

Negotiations for the 2006-2009 Agreement resulted in some relief for institutional agencies with regard to the notice required for personal leave use surrounding a holiday. Existing language already prohibited all OCSEA employees from taking personal leave on a holiday. Language was added to §27.04 for specified institutional agencies that requires request for personal leave use on the day before or after specified holidays to be requested seven days in advance.

## **GUIDELINES AND FURTHER EXPLANATION**

**Reminder: These provisions apply only to personal leave requests from employees covered by the OCSEA Agreement.**

- Q1. Is management’s ability to set minimum staffing levels regulated by the contract?
- A1. No. Management maintains the right to determine staffing levels, including setting minimum staffing levels.
- Q2. How can management still maintain minimum staffing levels and comply with the provisions of the contract?
- A2. Remember that Article 27 applies only to the granting of requests for personal leave. Management maintains its right to determine the overall minimum staffing levels through the granting of other forms of leave and the use of overtime.
- Q3. Is management required to use overtime in order to grant personal leave requests?
- A3. Not always. Section 13.02 states that “[i]t is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time.” While this does not apply to advance requests for Personal Leave, it does apply to the use of other leaves. In addition to using overtime, management may deny requests for the use of vacation leave

and/or compensatory time. Keep in mind that denial of either form of leave has other consequences.

- a.) Denying a request for use of compensatory time allows the employee to request to be paid for the hours denied.
- b.) While simply denying the use of vacation leave is less problematic, recalling an employee from a vacation leave results in the payment of time and one-half for hours worked and some employee vacation expenses if requested. **IT SHOULD ALSO BE NOTED THAT THE STATE AND UNION DO NOT AGREE ABOUT THE INTERPRETATION OF §28.03 REGARDING THE CANCELLATION OF VACATION REQUESTS ALREADY GRANTED. CONSEQUENTLY IT IS POSSIBLE THAT CANCELLATION OF A GRANTED VACATION LEAVE REQUEST COULD RESULT IN ADDITIONAL PAYMENTS SHOULD THERE BE AN ARBITRATION OF A GRIEVANCE AND THE UNION PREVAILS. THE STATE, HOWEVER, BELIEVES THAT CANCELLING VACATION IS IN ACCORDANCE WITH ARBITRATOR SMITH'S AWARD (No. 1882).**

- Q4. Should management deny requests for use of vacation and compensatory time and prescheduled sick leave?
- A4. Where needed, (i.e., when posts or positions must be staffed) management should continue to use minimum staffing levels to determine the total number of employees to be allowed off duty on any one day. This also applies where a particular group of employees is needed to accomplish a particular task within a limited period of time. (e.g., at fiscal year end, a group of accountants may be needed to process certain work.) If management restricts vacation or leave during this period of time, the procedures described below will apply.

**IF MANAGEMENT USES DESIGNATED SLOTS AS A PLANNING TOOL, THE PRACTICE OF SLOTTING A GIVEN NUMBER OF EMPLOYEES FOR A PARTICULAR KIND OF LEAVE MAY HAVE TO BE MODIFIED.** (e.g., where a total of twelve employees may be allowed off duty on shift or day, it is no longer acceptable to slot three for sick leave, three for compensatory time, three for vacation leave and three for personal leave.) The contract requires that employees in seven day operations shall be given the opportunity to request vacations by a specified date each year. Therefore, such vacation request will need to be granted. However, vacations requested at other times of the year shall be first come/first served basis. Accordingly, such vacation requests are not required to be granted. Also, while it is possible to continue to set aside slots for sick leave usage they may not be used to deny requests for personal leave.

Except for vacation scheduled on an annual basis, (or subject to provisions of previous settlements of grievances or ULP) requests for leave should be accepted on a first come/first granted basis and be divided by type. **All** requests for personal leave submitted more than 48 hours in advance **shall** be granted immediately upon receipt. As requests for vacation, compensatory time and sick leave (for prescheduled appointments, etc.) are received they

should also be granted in accordance with the contract up to the point that the total number of slots are filled.

At the point that the total number of slots are filled, and an additional request for personal leave is received with at least 48 hours advance notice, the following options should be considered:

- a.) If management desires it can begin assigning overtime using the normal procedures.
- b.) If management cannot find sufficient volunteers for overtime and still desires to use overtime rather than canceling already authorized requests for use of vacation leave or compensatory time, it may use voluntary overtime from supervisors.
- c.) If management chooses not to request overtime from supervisors or no supervisors desire the overtime, management may require mandatory overtime from bargaining unit employees pursuant to the terms of §13.07.
- d.) If management does not desire to bear the cost of overtime, it may cancel previously granted requests for vacation leave or compensatory time. Prescheduled sick leave cannot be denied. Please note that the denial of requests for use of compensatory time may result in the payment of what amounts to overtime if the employee requests to be paid for the denied compensatory time.
- e.) If all of the above fail to produce sufficient staffing, management must then require overtime by supervisors who are qualified to perform the work needed to be done to the extent that to do so does not place an unreasonable hardship on the supervisor or the Employer, or does not create an unsafe working condition.

Q5. What does all of this mean to a supervisor?

A5. It means that where you have a minimum staffing requirement, denial of requests for personal leave submitted at least 48 hours in advance, can occur only when you have the following circumstances:

- a.) You have granted all previous requests for personal leave submitted more than the 48 hours in advance; and you now have none of your **total slots** for leave remaining open; and you have attempted to use all available personnel as follows:
  - i.) you have not scheduled vacations or the use of compensatory time, or you have canceled previously granted use of those leaves;
  - ii.) you have scheduled overtime either voluntary, mandatory or both and you do not have available any bargaining unit employees qualified to perform the work;
  - iii.) you have directed supervisors to work overtime and you do not have available any other supervisors qualified to perform the work.

This appears to be the point of last resort. Although the Union will likely not agree with us about this, we believe that at this time you may deny a personal leave request submitted 48 hours in advance.

Q6. Does 48 hours mean literally 48 hours or two working days?

A6. It means literally 48 hours. For example, if an employee requests personal leave for Monday on the previous Friday, they have made the request at least 48 hours in advance.

**NOTE:** We recognize that sick leave requests as “call-offs” will affect the total number of employees off duty. As this use of sick leave cannot be readily predicted, these requests will likely drive the need for overtime where other slots have been filled by personal leave requests.

As always, please call your Labor Relations Specialist at OCB with any questions you may have regarding the interpretation of this or other subjects.