U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS U.S. PENITENTIARY, MARION, ILLINOIS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2343 Charging Party	Case No. CH-CA-50382

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JULY 31, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 29, 1995
Washington, DC

MEMORANDUM DATE: June 29, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY, MARION,
ILLINOIS

Respondent

and Case No. CH-
CA-50382

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2343

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS U.S. PENITENTIARY, MARION, ILLINOIS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2343 Charging Party	Case No. CH-CA-50382

Marcus Williams, Esquire
For the Respondent

Patricia S. McMeen, Esquire
For the Charging Party

Peter A. Sutton, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

The Complaint in this case, which issued on April 21, 1995, alleged that, ". . . Respondent has failed and refused to comply with Arbitrator Gruenberg's opinion and award . . . ." Respondent admitted that it had refused to allow Mr. Jeffrey Dwyer to substitute 104 hours of sick leave for annual leave used in connection with the hospitalization and death of his father in 1994; but denied that it had failed to comply with Arbitrator Gruenberg's opinion and award. On May 9, 1995, General Counsel filed a Motion for Summary Judgment, pursuant to § 2423.22 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.22, asserting that, "Since there are no material issues of fact in dispute, it is appropriate to dispose of this case under the summary judgement procedures. Department of Veterans Affairs, Medical Center, Chillicothe, Ohio, 44 FLRA 842

(1992)." (Motion, p. 4). On the same day, May 9, 1995, the Regional Director, pursuant to § 2423.22(b)(1) of the Rules and Regulations, 5 C.F.R. § 2423.22(b)(1), referred the Motion to the Chief Administrative Law Judge who, on May 16, 1995, issued an Order To Show Cause whereby Respondent was ordered to show cause, in writing, on or before May 31, 1995, why General Counsel's Motion for Summary Judgment should not be granted; General Counsel and the Charging Party were given leave to file on, or before, June 12, 1995, a response to any timely reply by Respondent; and this case was duly assigned to the undersigned for disposition.

Respondent filed a Response to the Motion for Summary Judgment, dated May 16, 1995, and received on May 17, 1995. Charging Party filed a Response to Respondent's Reply [Response], dated and received June 7, 1995, and General Counsel filed a Response, dated June 12, 1995, and received on June 15, 1995, which have also been carefully considered. Although Respondent requested that General Counsel's Motion For Summary Judgment be denied, Respondent does not assert that there are any material issues of fact in dispute and as an alternative, ". . . seeks resolution of this matter through the submission of legal briefs instead of a hearing." (Respondent's Reply, unnumbered, but the third page). I fully agree that there are no material issues of fact in dispute and, accordingly, will decide this matter on the basis of the Motion, and the attached documents, including: the Charge (Exhibit A); Complaint (Exhibit B); Answer (Exhibit C); Arbitration Opinion and Award, dated December 7, 1994 (Exhibit D); Charging Party's letter dated December 13, 1994, to Mr. James F. Hyland (Exhibit G); Respondent's Memorandum, dated December 16, 1994, with attached Memorandum dated December 12, 1994, from Ms. Regina A. Sullivan (Exhibit H); and Respondent's letter dated January 25, 1995, from Mr. James K. Irvin to Ms. Patricia S. McMeen, Esquire (Exhibit I); together with Respondent's Response, and Charging Party's and General Counsel's Responses to Respondent's Reponse, which constitute the record in this case.

Findings and Conclusions

Employee Jeffrey Dwyer, during the period of January 15, 1994, to April 15, 1994, used 192 hours of accumulated annual leave and advanced annual leave to care for his father during his father's fatal illness and eventual death on April 15, 1994. Mr. Dwyer had requested permission to use a portion of his 420 hours of accumulated sick leave in lieu of annual leave but this request was denied; however, as noted, advanced annual leave was granted. On May 9, 1994, Mr. Dwyer filed a grievance over Respondent's refusal to grant the use of sick leave in lieu

of annual leave and, when the dispute could not be resolved, the Charging Party requested arbitration and the Opinion and Award of Arbitrator Gladys W. Gruenberg issued on December 7, 1994.

The Arbitrator denied the grievance, stating in her "Award":

> "1. Under the Agreement, law, Agency rules and regulations existing at the time the grievance was filed, the Grievant's request for substitution of sick leave for annual leave is denied." (Exhibit D, p. 11).

However, because Article 3 of the parties' Agreement provided that, ". . . the parties will be bound by any future laws and regulations" and OPM had issued proposed regulations on May 11, 1994, which would permit a limited amount of sick leave to be used for the care, inter alia, of a parent, the Arbitrator further stated in her Award:

> "2. "If the revision of sick leave rules proposed by OPM on May 11, 1994, becomes effective during the leave year when the Grievant's absence to care for his father's last illness occurred, then the Agency shall permit the Grievant to substitute for annual leave the number of sick leave days allowable." (Emphasis supplied).
>
> "3. The arbitrator retains jurisdiction of this matter for 60 days, that is, until February 6, 1995, to resolve any dispute that may arise between the parties in connection with implementation of this award." (Exhibit D, p. 11).

1. No Failure To Comply With Award

The short answer to the allegation of the Complaint, that Respondent has failed to comply with the Arbitrator's opinion and award, is that the allegation is wholly unsupported by the record. To be more precise, as Respondent states, the record affirmatively shows that Respondent, ". . . is currently in full compliance with the award . . . ." (Respondent's Response, first page).

As paragraph 16 of the Complaint states, Arbitrator Gruenberg's opinion and award provided,

> "If the revision of sick leave rules proposed by OPM on May 11, 1994, becomes effective . . . then the Agency shall permit the Grievant to substitute for annual leave the number of sick leave days allowable." (Emphasis supplied).

The revision of sick leave rules proposed on May 11, 1994, never became effective. Accordingly, paragraph 2 of the Arbitrator's Award never became operative and, as paragraph 1 of the Award had denied the request for substitution of sick leave for annual leave, Respondent was, and is, in full compliance with the Award. Not only is the condition precedent plainly and unambiguously stated in paragraph 2 of the Award, but the Arbitrator further stated in her Opinion,

> ". . . if the proposed rule change does become effective during the Grievant's 'leave year,' the Grievant would be entitled to a substitution of sick leave . . . If the revision does not become effective until a new leave year begins under the OPM proposed revision, the Grievant would not be entitled to make that substitution." (Exhibit D, p. 9).

OPM's May 11, 1994, proposed revision did not become effective because it was superseded by the "Federal Employees Family Friendly Leave Act," P.L. 103-388, approved October 22, 1994, and effective December 22, 1994 ["This subsection shall be effective during the 3-year period that begins upon the expiration of the 2-month period that begins on the date of the enactment of this subsection." (P.L. 103-388, 108 STAT. 4079, 5 U.S.C.A. § 6307(d)(4)(A)]. To be sure, OPM issued Regulations on December 2, 1994 (Exhibit F) concerning, inter alia, the use of sick leave to care for family members; but these were final regulations under the "recently enacted Federal Employees Family Friendly Leave Act" (Exhibit F, Summary, F.R. p. 62266). Although this regulation was made effective December 2, 1994 (Exhibit F, F.R. pp. 62266, 62270), despite the provision of the Statute, as set forth above, which made the law effective beginning December 22, 1994, nevertheless, as more fully set forth hereinafter, there was no retroactivity and no substitution of sick leave for annual leave previously used for the care of a sick family member was permitted.

2. Respondent Notified Charging Party that OPM's May 11, 1994, Proposal had not Become Effective.

First, by its letter dated December 16, 1994, to Mr. Ronald Beckman, President, Local 2343 (Exhibit H), Respondent advised the Charging Party that OPM's May 11, 1994, proposed regulation had not become effective; that a different proposal had become law (P.L. 103-388); that its effective date was December 2, 1994; and that there was no retroactivity. Second, by its letter dated January 25, 1995, to Ms. McMeen, counsel for the Charging Party (Exhibit I), Respondent again stated, in part, as follows:

> "OPM's May 11, 1994 submitted revision did not become effective. Although not addressed in the Award, Public Law 103-388 became effective December 2, 1994. As previously indicated . . . this law was not retroactive. Therefore, the agency has complied fully with Ms. Gruenberg's Opinion and Award." (Exh. I).

Respondent's notification, that OPM's May 11, 1994, proposal had failed, i.e., it would never become effective because it had been superseded by Public Law 103-388, left no doubt whatever that the qualification of the Award, namely, "If the revision of sick leave rules proposed by OPM on May 11, 1994, becomes effective . . . then the Agency shall permit the Grievant to substitute for annual leave the number of sick leave days allowable" (Exhibit D, p. 11) had not come to pass and would never come to pass because Congress had enacted a superseding law. The Arbitrator quite specifically had conditioned the substitution of sick leave on OPM's May 11, 1994, proposed revision becoming effective. The Arbitrator had retained jurisdiction, ". . . until February 6, 1995, to resolve any dispute that may arise . . . . ." (Exhibit D, p. 11) and, if there had been any dispute concerning the Award, it could have been submitted to the Arbitrator. As the Award is clear, unambiguous and directive, the failure of the very specific condition of paragraph 2 of the Award terminated the Award with the denial of the grievance (Exhibit D), paragraph 1, p. 11).

3. Statutory enactments bar retroactive substitution of sick leave

Although the Opinion and Award of the Arbitrator was dated December 7, 1994 (Exhibit D), plainly the Arbitrator gave no consideration to three legislative enactments which, collectively and individually, bar retroactive substitution of sick leave for annual leave used to care for an ill family member.

The first two legislative enactments were riders to the Treasury, Postal Service and General Government Appropriations Act, 1995, P.L. 103-329, September 30, 1994. One concerned leave to permit the recipient to serve as a bone-marrow or organ donor and the other concerned leave for an adoption-related purpose. It is significant that the bone-marrow or organ donor provision was not retroactive; however, the adoption-related provision permitted substitution of sick leave for annual leave used and made the substitution retroactive to October 1, 1991. Section 629 of P.L. 103-329 provided, in relevant part, as follows:

> SEC. 629. (a)(1) Subchapter II of chapter 63 of title 5, United States Code, is amended by adding at the end the following:
>
> **"§ 6327. Absence in connection with serving as a bone-marrow or organ donor**
>
> "(a) An employee in or under an Executive agency is entitled to leave without loss of or reduction in pay, leave to which otherwise entitled, credit for time or service, or performance or efficiency rating, for the time necessary to permit such employee to serve as a bone-marrow or organ donor.
>
> "(b) Not to exceed 7 days of leave may be used under this section by an employee in a calendar year.
>
> "(c) The Office of Personnel Management may prescribe regulations for the administration of this section."[1]
>
> . . .

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[1] On December 2, 1994, OPM announced,

> ". . . The Office of Personnel Management (OPM) does not believe regulations are needed to administer section 6327. Agencies are responsible for notifying employees of this new entitlement to paid leave. . . ." (Exhibit F, F.R. p. 62272). Interim Regulations for substitution of sick leave for annual leave used for adoption - related purposes were issued on December 2, 1994 (Exhibit F, F.R. p. 62274); and final regulations issued on May 22, 1995 (F.R., vol. 60, no. 98, p. 26979.

(b)(1) Section 6307 of title 5, United States Code, is amended--

(A) by redesignating subsection (c) as subsection (d);

(B) by inserting after subsection (b) as the following:

"(c) Sick leave provided by this section may be used for purposes relating to the adoption of a child."; and

(C) in subsection (d) (as so redesignated by subparagraph (A)) by inserting "or for purposes relating to the adoption of a child," after "ailment,".

(2) Section 6129 of title 5, United States Code, is amended by striking "6307 (a) and (c)," and inserting "6307 (a) and (d),".

(3)(A) The Office of Personnel Management shall prescribe regulations under which any employee who used or uses annual leave for an adoption-related purpose, after September 30, 1991, and before the date as to which sick leave first becomes available for such purpose as a result of the enactment of this subsection may, upon appropriate written application, elect to have such employee's leave accounts adjusted to reflect the amount of annual leave and sick leave, respectively, which would remain had sick leave been used instead of all or any portion of the annual leave actually used, as designated by the employee.

. . . ." (102 STAT. 2423-2424)

The third enactment was the Federal Employees Family Friendly Leave Act, P.L. 103-288, 108 STAT. 4079, October 22, 1994, which provided, in relevant part, as follows:

Section 6307 of title 5, United States Code, is amended by adding at the end the following:

. . .

"(d)(2) Subject to paragraph (3) and in addition to any other allowable purpose, sick leave may be used by an employee--

"(A) to give care or otherwise attend to a family member having an illness, injury, or other condition which, if an employee had such condition, would justify the use of sick leave by such an employee; or

"(B) for purposes relating to the death of a family member, including to make arrangements for or attend the funeral of such family member.

"(3)(A) Sick leave may be used by an employee for the purposes provided under paragraph (2) only to the extent the amount used for such purposes does not exceed--

"(I) 40 hours in any year, plus

"(ii) up to an additional 64 hours in any year, but only to the extent the use of such additional hours does not cause the amount of sick leave to the employee's credit to fall below 80 hours.

. . .

"(4)(A) <u>This subsection shall be effective during the 3-year period that begins upon the expiration of the 2-month period that begins on the date of the enactment of this subsection</u>.

. . . ." (108 STAT. 4079-4080)

Final regulations to implement the Federal Employees Family Friendly Leave Act were issued December 2, 1994 (Exhibit F, F.R. pp. 62270-62272).

As noted above, there was no retroactivity of the Statute. To the contrary, the Statute stated, ". . . This subsection shall be effective during the 3 year period that begins on the date of the enactment of this subsection." The date of enactment was October 22, 1994 (108 STAT. 4080) and the effective date would have been December 22, 1994; however, as also noted above, OPM, ". . . determined that regulatory provisions consistent with the entitlement provided by this legislation should be made effective immediately. . . ." (Exhibit F, F.R., p. 62266). Accordingly, OPM's regulations were effective December 2, 1994. There was no retroactivity; there was no authorization for the substitution of sick leave for annual leave previously used for an ill family member, as there was for adoption-related absences. Indeed, the regulations revised Subpart E-Recredit of Leave to remove the 3-year break-in-service limitation on the recredit of sick leave for former employees who are reemployed on, or after, December 2, 1994 (Exhibit F, F.R. pp. 62271-62272; § 630.502); and reestablishment of leave account after military service (Exhibit F, F.R. p. 62272, § 630.504); but there may be no recredit of annual leave except under 5 C.F.R. § 630.501 (when an employee transfers between positions (630.501(a)) or when annual leave is transferred between different leave systems under 5 U.S.C. § 6308, or is recredited under 5 U.S.C. § 6306 (630.501(b)).

Because the Federal Employees Family Friendly Leave Act governs; because it is not retroactive; and because it does not permit the substitution of sick leave for annual leave used before December 2, 1994, for the care of an ill family member, Respondent did not fail or refuse to comply with Arbitrator Gruenberg's Opinion and Award and did not violate § 7116(a)(1) or (5) of the Statute. Accordingly, General Counsel's Motion for Summary Judgment to require grievant Dwyer to substitute sick leave for annual leave is denied; and Respondent's alternative motion for judgment on the record is granted and it is hereby:

ORDERED

The Complaint in Case No. CH-CA-50382 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: June 29, 1995
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. CH-CA-50382, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: June 29, 1995
Washington, DC