

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

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FILE: B-181686

DATE:

SEP 2 1975

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MATTER OF:

Charles T. Turner - Approval of sick leave for incapacity due to fatigue

DIGEST:

Award of arbitrator granting sick leave to an employee who attended sick member of family not afflicted with a contagious disease, who as a result was not able to perform his duties may not be implemented by agency since there is no legal authority to grant sick leave in the circumstances.

The Federal Aviation Administration (FAA), Department of Transportation, asks whether it may legally comply with an arbitrator's award in FAA and Professional Air Traffic Controllers' Organization (PATCO), Anthony J. Sabella, Arbitrator (case No. 74K/03131). The award requires that an employee be charged sick leave rather than annual leave for an absence of 5 hours because of physical fatigue resulting from lack of sleep. The stipulated facts on which the award is based are summarized as follows.

At 5:30 a.m. on June 14, 1973, the grievant, Mr. Charles T. Turner, Air Traffic Control Specialist at the Memphis Air Route Traffic Control Center, called the Center to request sick leave because he had been up during the night with his sick wife and needed rest. The request was made to Mr. Roy Turner, Assistant Chief at the Center who was the management official in charge of the 12 midnight to 8 a.m. shift. The grievant stated that he needed some rest and would try to make it in to work at a later time. Assistant Chief Turner approved the sick leave request and relayed that information to Mr. Joe Anderson, Assistant Chief on the day shift.

At 8:30 a.m. that morning, Assistant Chief Anderson called the grievant at his home and asked him about his intentions for reporting to work at a later time. During that conversation Mr. Anderson questioned whether the absence could be charged to sick leave. Mr. Anderson told the grievant that the Center needed him and asked him if he intended to come in. The grievant agreed to come in, and he reported for work at 9:20 a.m.

Upon arriving at the Center, the grievant informed his team supervisor that he was not physically able to control traffic and that he wanted to take leave as soon as he could be spared. He was

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assigned to an "A" position, which does not require the handling of live air traffic. He worked that position until 1 p.m. at which time leave was approved for the remainder of the day. The team supervisor advised the grievant that he was not sure whether the leave would be annual or sick leave. Later the chief of the Memphis Center decided that the grievant's absence would be charged to annual leave. Accordingly, Mr. Charles T. Turner was charged 3 hours annual leave from 0700-1000 hours and 2 hours annual leave from 1300-1500 hours.

The employee's grievance was submitted to arbitration pursuant to the dispute settlement procedure set forth in Article 7 of the April 1973 labor-management agreement then in effect between PATCO and the FAA. The agency relied upon Article 42 of the PATCO agreement which provides that the administration of all matters covered by the agreement is governed by existing or future laws and the regulations of appropriate authorities, including the policies set forth in the Federal Personnel Manual (FPM).

The union contended that the denial of sick leave was a violation of Article 29 of the PATCO agreement which provides in pertinent part as follows:

"Section 1. An employee shall earn and be granted sick leave in accordance with applicable law and regulations.

"Section 2. Approval of sick leave shall be granted to an employee who is incapacitated for the performance of his duties."

In reaching the conclusion that the grievant should have been allowed sick leave, the arbitrator noted that the parties had agreed on the broad language "incapacitated for performance of his duties," rather than the language of Civil Service Commission regulations which allows sick leave when an employee "is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement." The arbitrator stated that the general meaning of "incapacitated" is to be unfit or incapable or disqualified and that "[o]ne who is required to be mentally alert, fit to make a decision affecting lives is as incapacitated by physical and mental fatigue, lack of rest, etc. as the typist who may have broken a hand." He added that the

assigning of the "grievant in a position, not involving live air traffic was some indication that grievant's condition was incompatible with controlling air traffic, his job duty." The arbitrator, therefore, sustained the grievance and ordered the absence charged to sick leave.

In the request for our decision, the FAA questions whether it may properly implement the arbitrator's award in granting the employee sick leave for June 14, 1973. The FAA states its belief that the disapproval of sick leave is in accordance with the Civil Service Commission's regulation on sick leave (5 C.F.R. § 630.401) which provides for granting sick leave when the employee:

- "(b) Is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement;
- "(c) Is required to give care and attendance to a member of his immediate family who is afflicted with a contagious disease; or \* \* \*."

The FAA's letter concludes by stating that the arbitrator's award appears to conflict with the Civil Service Commission's regulation and, therefore, requests our decision as to compliance with the award. First of all, we note that section 6311 of title 5, United States Code, vests the Civil Service Commission with the authority to prescribe the conditions under which sick leave may be granted.

As to the effect of an arbitration award that is not in keeping with the controlling laws and regulations, Executive Order No. 11491, October 29, 1969, as amended, provides that applicable law and regulations will be controlling over the labor-management agreement. Section 12(a) thereof provides, among other things, that any agreement entered into between an agency and a labor organization is subject to the provisions of existing or future laws and regulations, including policies set forth in the FPM. The same provision is included in Article 42 of the FAA-PATCO agreement.

Because of the Commission's statutory duty to prescribe regulations for sick leave, we requested the Commission's opinion on whether the arbitration award of sick leave to Mr. Charles T. Turner conflicts with the regulations. The Commission, by its Director,

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Bureau of Policies and Standards, advised us that the arbitrator's award clearly conflicts with the sick leave regulations for the following reasons.

The Commission stated that, although Mr. Charles T. Turner may have been incapacitated to perform his duties, he was not incapacitated for any of the specific reasons cited by Civil Service Commission Regulation 630.401, quoted above. The Commission stated that it "has consistently interpreted this regulation to mean that sick leave is appropriate for use only when the circumstances specifically and literally meet the criteria contained in the regulation."

Moreover, the Commission stated that the generous amounts of annual leave granted to Federal employees were authorized by law with the understanding that they were meant for more than vacations, i.e., annual leave was also to be used for a variety of personal and emergency reasons. Such reasons can include transporting member of the family to a doctor or hospital for emergency treatment; staying home with a member of the family who is ill, but not with a contagious disease; being tired or fatigued because of loss of sleep due to any one of a number of causes, ranging from care of an ill member of the family to worry over family problems.

The Commission concluded that the arbitrator's award conflicts with its regulations on sick leave, and does not recognize the appropriateness of annual leave to the circumstances in this case.

We agree with the Commission's reasoning and conclusion. We would further add that the arbitrator failed to give effect to section 1 of Article 29 of the agreement which expressly provides that sick leave will be granted "in accordance with applicable law and regulations." Section 2 of the article in providing for approval of sick leave for an employee who is incapacitated for duty must be read in the light of section 1 to incorporate the specific incapacitating factors listed in the Commission's regulations.

Accordingly, the arbitrator's award of 5 hours of sick leave to Mr. Charles T. Turner may not be lawfully complied with. See 53 Comp. Gen. 1054 (1974).

**R.F.KELLER**

[Deputy] Comptroller General  
of the United States