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**Memorandum**

**From: Randy Holloway (JUS)**

**Sent: January 13, 1999**

**Subject: Urgent Communication: Special and Compassionate Leave**

*Copy of original document available from your union stewards.*

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*It is important that managers exercise discretion in granting special and compassionate leave on a case by case basis, and that their decisions be reasonable and non-discriminatory.*

The Special and Compassionate Leave reference to the Public Service Act is “Section 69 of Regulation 977,” the reference to the OPSEU Collective Agreement is, “Article 75,” and in the AMAPCEO Collective Agreement is “Article 23.3.”

If you have any concerns or questions, please contact your Human Resources Consultant.

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**Special and Compassionate Leave – Guidelines for Managers**  
**Revised: January, 1999**

The following guidelines are a general framework or reference guide when considering requests for special and compassionate leave with pay, which incorporates the Religious Holidays policy. Managers should note that these Guidelines are not all inclusive; managers continue to be responsible for exercising independent, discretionary decision-making. The principles outlined in the following apply equally to requests for special and compassionate leave with pay under Article 49 (full-time) and Article 75 (RPT) of the OPSEU Collective Agreement, Article 23.3.1 of the AMAPCEO Collective Agreement and Section 69(1) of Regulation 977 under the Public Service Act.

**Exercising Discretion**

Articles 49 and 75, of the Collective Agreement with OPSEU, read as follows:

- (1) A Deputy Minister or his designee may grant an employee leave of absence with pay for not more than three (3) days in a year upon special or compassionate grounds.
- (2) The granting of leave under this Article shall not be dependent upon or charged against accumulated credits.

These Articles require management to exercise discretion in determining the circumstances under which special and compassionate leave will be granted. However, this discretion is not absolute. It has been firmly established by arbitrators that the discretion permitted to management must be exercised in a manner which is reasonable and non-discriminatory. Failure to exercise its discretion in this manner will result in a ruling that management has violated the provisions of the collective agreement.

## **Factors considered by Arbitrators**

In determining whether management's discretion has been exercised in a reasonable and non-discriminatory manner, arbitrators essentially consider four factors. It is therefore important that managers ensure that, when considering a request for special and compassionate leave, the decision is made in accordance with these four factors. The factors considered by arbitrators are:

**1. The decision must be made in good faith and without discrimination.**

Decisions made in good faith are those which are made for "legitimate business" purposes. The decisions are made with an honesty of purpose, without hidden motives. In order to avoid allegations of discriminatory treatment, employees with similar circumstances must be treated similarly and managers should not rely on personal characteristics of an individual as a basis for making a decision.

**2. There must be a genuine exercise of discretionary power, as opposed to rigid policy adherence.**

Managers must be able to demonstrate that regardless of the existence of a policy or guideline, an investigation into the request occurred and that true, independent discretionary decision-making was exercised based upon a review of the specific circumstances of the request.

In one case before the Grievance Settlement Board, the grievor was denied special and compassionate leave to stay home with her ill child on the basis that the Ministry's policy allowed leave under the special and compassionate provisions of the OPSEU collective agreement for an illness only when the child was hospitalized or attended at a hospital emergency room. The Board, in allowing the grievance, found that the employer made its decision solely on the basis of its policy and failed to review the individual merits of the request. The employer therefore, did not exercise its discretion in applying the policy.

Similarly, the Board has found that restricting the use of the special and compassionate provisions of the OPSEU collective agreement to an unplanned event of a personal nature which was an "emergency" as one Ministry did in a particular case, was unreasonable. The Board stated that:

"Compassionate leave is granted to an employee when he or she is in a situation deserving of sympathetic treatment. This would obviously include emergencies beyond the control of the employee... however, it is unnecessarily restrictive to say that a compassionate leave should be confined to emergencies, (because) what could be called a "planned event," such as major surgery for a spouse or a court date for a child scheduled in advance, may also be regarded as circumstances requiring compassionate treatment by an employer..."

**3. Consideration must be given to the merits of the individual application under review.**

This factor requires a thorough investigation by management into the employee's request. Failure to conduct such an investigation will result in a determination that management

has failed to exercise its discretion. For example, in one case the grievor requested leave under the special and compassionate provisions to attend his sister's mother-in-law's funeral. The grievor also requested that, if leave was not allowed, he be permitted to utilize one lieu day. Based upon the evidence, the Board determined that management had failed to consider the request at all and instead had granted the lieu day.

The Board stated:

“The grievor should have had his request for compassionate leave considered. He had clearly requested such a leave and was entitled to have his request properly considered. Management does not have the unilateral right to change the thrust of his request.”

4. **All relevant facts must be considered and conversely irrelevant consideration must be rejected.**

Based upon its investigation, management must determine which facts are relevant in reaching its decision. It is clear from the wording of Article 49 and 75 that the granting of special and compassionate leave must not depend upon the existence of accumulated credits including vacation leave credits. It should also be noted that it is also unacceptable for management to unilaterally deduct credits from some other source such as lieu days or vacation credits.

Other irrelevant considerations in making the decision would be the performance, absenteeism, or disciplinary record of the individual, and so forth.

Reviewing the foregoing four factors and utilizing the attached check list will assist managers in demonstrating that discretion has been exercised in a reasonable and non-discriminatory manner. Arbitrators hesitate to interfere with a manager's decision unless management has exercised discretion in appropriately.

Contact your Human Resources Consultant should you have any questions regarding special and compassionate leave.

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**Guidelines for Exercise of Discretion**  
**Regarding Special and Compassionate Leave**

**Situation and Examples of Factual Questions to be Considered**

*1. Attending to family-related matters involving child, parental or other dependent care.*

Such requests should be reviewed with sensitivity to the commitment of the Ministry to assist employees in balancing work and family life. Some consideration might, however, be given to: What is the nature of the relationship with the individual? How serious is the illness? Could another individual have attended the relative? Why was the employee's presence necessary? Did

the employee attempt to make alternate arrangements? Could the situation have been dealt with during non-working hours?

**2. *Unable to attend work due to weather conditions.***

Where does the employee live in relation to the facility? Did any other employees who live in that vicinity make it into work? Where do the employees who made it in live in relation to that facility? What was the impact of the storm on the city the employee lives in and the surrounding areas? What weather information has been received from the local radio station? What were the road conditions between the employee's residence and work? What mode of transportation does the employee use e.g. train, 4-wheel drive vehicle? Was there an alternate mode of transportation available? Were there any accidents in the vicinity? What attempts did the employee make to get to work?

**3. *Failure of a babysitter to turn up.***

In keeping with the Ministry's commitment to balancing work and family life, greater sensitivity should be shown towards such requests. Once again, however, consideration might be given to: what contingency plans had the employee made? Could someone else have cared for the child? What daycare facilities are in the area? How such notice was the employee given by the babysitter? What attempts were made to get an alternate babysitter?

**4. *Transportation breakdown.***

Where does the employee live? Could the breakdown have been anticipated? What precautionary measures had the employee taken? What alternate modes of transportation were available to the employee? Who attended the scene of the breakdown? Did any other employees affected by the same breakdown make it into work? If so, why didn't the employee? What attempts did the employee make to get into work.

**5. *Assisting a person in need.***

Why was the person in need? Why was the employee's assistance required? Could someone else have provided the assistance? Could the assistance have been provided outside of work hours? What would have been the consequences of not providing assistance? Was the employee's presence required the entire time?

**6. *Household emergencies (e.g. mechanical breakdowns, pipes leaking)***

What was the nature of the emergency? Could it have been avoided? Could someone else have attended to the emergency? What would be the consequences of not attending to the emergency until after hours?

**7. *Ceremonies and celebrations.***

What is the nature of the occasion? Why is the employee's attendance required? How important is attendance to the employee? Could the occasion be conducted during non-working hours? What would be the consequences of the employee not attending?

#### **8. *Moving.***

(Generally speaking, unless extraordinary circumstances exist, moving is not necessarily considered a matter appropriate for special and compassionate consideration. However, a full review of the circumstances surrounding the request will have to be undertaken to determine this in accordance with the four-fold test). Why can't the move be conducted during non-working hours? What is the reason for the move? Why is the employee's presence required? Could someone else attend in place of the employee?

#### **9. *Death.***

Is the bereavement leave article applicable? If not, is there some aspect of the relationship which justifies special and compassionate leave? Are there circumstances which justify special and compassionate leave? What was the nature of the employee's relationship with the deceased? If not a direct relative, was there a close or special relationship?

#### **10. *Religious Holidays.***

Now covered under the Religious Holidays Policy issued by the Human Resources Branch on September 18, 1992. (For a list of religious holidays, please see the HR Open Web Site at [hr.mbs.gov.on.ca](http://hr.mbs.gov.on.ca), under Pay and Benefits.) In general the process involves checking whether the Religious Holiday requested is on the list of Recognized Religious Holidays produced by the Management Board Secretariat. Under the policy, up to 2 days leave with pay in total per year will be permitted to classified employees for Religious Holidays. Requests for further Holidays and requests by unclassified staff would be accommodated as much as possible through other scheduling arrangements, use of other credits or finally leave without pay. The Religious Holidays Policy does not expand total entitlements under the Special and Compassionate Leave provisions. If the employee has already used their full 3 days for other reasons, the request would have to be accommodated in one of the other manners discussed above. The Employer still clearly has a legal obligation to reasonably accommodate an individual's need for time off for religious observance. What the policy addresses is when this will be with pay under Article 49 and 75 and when it will need to be handled in some other manner. For complete details on Religious Holiday requests, please refer to the Policy.