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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-197438 (JAB)

March 12, 1980

Mr. Alvin Schlossman
12608 Montclair Drive
Silver Spring, Maryland 20904

Dear Mr. Schlossman:

[REVIEW OF]

Your letter of January 2, 1980, to Mr. Elmer B. Staats, Comptroller General of the United States, has been forwarded to us by Congressman Michael S. Barnes. You have requested that we review certain Comptroller General decisions regarding restoration of forfeited annual leave which you believe are based upon an erroneous interpretation of law.

The decisions you cited are William D. Norsworthy, B-188284, 57 Comp. Gen. 325 (1978) and John Connor, B-189085, April 3, 1978. In those decisions we held that when an employee submits a formal and timely request for leave the agency must approve the leave either at the time requested by the employee, or, if that is not possible because of the agency's work load, at some other time. Where the leave is denied due to a public exigency we held that the agency must submit the matter to the designated official for his determination that an exigency in fact exists. We stated that agency failure to schedule the requested leave or to present the case to the proper official for a determination of a public exigency is administrative error and, that if an employee demonstrates that but for such administrative error he would be entitled to restoration of forfeited leave under 5 U.S.C. 6304(d)(1)(B), such leave may be restored under 5 U.S.C. 6304(d)(1)(A).

Section 6304(d)(1) of Title 5 provides that:

"Annual leave which is lost by operation of this section because of

- (A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;



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(B) exigencies of the public business when the annual leave was scheduled in advance; or

(C) sickness of the employee when the annual leave was scheduled in advance;

shall be restored to the employee."

You apparently believe that our decisions are based on a definition of administrative error not intended by Congress for, as you state:

"* * * In view of the specific requirements for restoration of forfeited leave under 5 U.S.C. 6304(d)(1)(B) based upon exigencies of the public business when such annual leave is scheduled in advance, I submit that it was not the intent of the law to permit leave restoration whenever supervisors in exercising their managerial responsibilities denied an employee's request for leave -- even if eventually that leave was forfeited. * * *"

You also state that the result of our decisions will be that:

"* * * every employee (and there are tens or hundreds of thousands each year) who forfeits annual leave each year need only submit a SF-71, Application for Leave, and if disapproved and not rescheduled, such leave would be eligible for restoration under 5 U.S.C. 6304(d)(1)(A). It also appears that if this leave is disapproved due to an exigency of public business and that decision is made by the officer authorized to make such decision, that leave would be eligible for restoration if the leave could not be rescheduled because the public exigency continued from the date of the requested leave through the end of the leave year."

We based our Norsworthy decision on the Congressional intention that 5 U.S.C. 6304(d)(1) would authorize restoration of leave lost through no fault of the employee, but would not

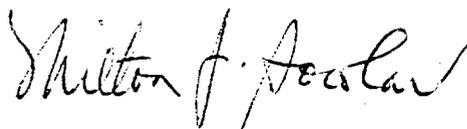
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authorize restoration of leave lost because the employee chose on his own volition not to use leave.

In light of that intention and since, as we explained in 39 Comp. Gen. 611 (1960), the taking of leave is an absolute right of the employee subject to the right of the head of the department or establishment concerned to fix the time at which the leave may be taken, we do not believe that an agency may cause an employee to forfeit leave by failing to schedule it or to present the matter to the proper official for a public exigency determination. Thus, if an employee timely submits a SF-71, Application for Leave, we feel his supervisor must either approve the leave, reschedule it to prevent forfeiture, or submit the matter for a public exigency determination. We believe that an agency's failure to take one of these actions is properly considered an administrative error. Such failure to act is in derogation of an employee's statutory right to restoration of leave. As to your statement that the two decisions will cost the Federal Treasury tens of millions of dollars, we strongly disagree. Federal agencies have always had the obligation to properly schedule annual leave. We feel that if leave is properly scheduled, the need for forfeiture and restoration will be greatly reduced.

We hope that the foregoing has been of assistance to you.

Sincerely yours,



Milton J. Socolar
General Counsel