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DECISION



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

FILE: B-187104

DATE: April 1, 1977

MATTER OF: Michael Dana et al. - Restoration of forfeited annual leave

DIGEST: Annual leave forfeited at end of 1974 leave year allegedly due to exigencies of the public business but not scheduled in advance may not be restored under 5 U.S.C. 6304(d)(1), even if employees did not have actual notice of scheduling requirement and it was known in advance that leave would not be granted if scheduled. Scheduling is a statutory requirement which may not be waived and failure to give actual notice of this requirement is not administrative error since employees are charged with constructive notice of it.

By letter dated August 2, 1976, from its Assistant Administrator, General Counsel, Mr. Thomas J. Madden, the Law Enforcement Assistance Administration (LEAA), United States Department of Justice, requests our opinion as to whether annual leave forfeited at the end of the 1974 leave year by five of its employees may be restored under the provisions 5 U.S.C. 6304(d)(1). The agency's letter, in pertinent part, reads as follows:

"The five applicants are Michael Dana, Alison Eliason, Luke G. Galant, Rufus Johnson, and Michael Favicchio. The latter four employees participated in a LEAA sponsored six-week training program starting on or about April 6, 1974. At the conclusion of the training program, each of the four was immediately detailed as a LEAA Field Service Representative to local units of general government participating in the LEAA sponsored Initiative Oriented Technical Assistance (IOTA) program. The four participated in the IOTA program through January 1975 for the purpose of providing the trainees with practical experience relating to the reality of the State and local criminal justice system structures and an opportunity to apply the previous six-week training to an on-site work experience. Participation by the four employees in the six-week

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training program and the IOTA program resulted in the four employees being away from their permanent duty stations for the period April 6, 1974, through January 1975. The fifth applicant for restoration, Michael Dana, was the Director of the Field Services Division, Office of National Priority Programs, LEAA, which was administering the IOTA Program out of the Washington, D.C. central office.

"In August 1974, the Department of Justice started to use Earning Statement Form MF-44 in place of Earning Statement Form DJ-708. The new form provided advance notice to Department of Justice employees as to the number of 'use or lose' hours to avoid forfeiture of annual leave. During September 1974, Field Services Representatives state that they raised questions with Mr. Dana as to the effect working in the field and not being able to take leave would have on the fact that they had leave they would otherwise lose. Mr. Dana has stated that he informed them that should the situation arise, he would submit a justification so that they would not lose their leave. Mr. Dana has also stated that he was not aware at the time of the implications of the requirement to schedule annual leave prior to the start of the third bi-weekly pay period before the end of the leave year. The LEAA Instruction I 1590.3, entitled 'Restoration of Forfeited Annual Leave,' which provided guidelines and procedures governing the restoration of forfeited annual leave, was issued on October 17, 1974. A copy of LEAA Instruction I 1590.3 is attached.

"Mr. Dana has further stated that his reading of the LEAA Instruction I 1590.3 did not clarify that any other necessary administrative action was necessary. As a result, neither Mr. Dana nor the other four applicants scheduled annual leave prior to the start of the third bi-weekly pay period before the end of the leave year. Notwithstanding the failure to schedule annual leave in advance,

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Mr. Dana has stated that in view of the exigencies of the IOTA program which, by administrative mandate, called for a completion of the diagnostic phase by January 31, 1975, it simply was not possible for any of the Field Services Representatives to take leave at that time.

"In support of Mr. Dana's request for restoration of forfeited annual leave, Mr. Dana's supervisor has stated that because of the workload and timetables of the IOTA program Mr. Dana was not able to use any substantial amount of annual leave.

"Based upon the above facts, this office requests your opinion as to two questions. First, where LEAA employees participate in training programs from April to January either at or away from their permanent duty stations and are unable to take annual leave because of the requirements of the program, is it necessary to schedule annual leave in advance pursuant to 5 U.S.C. § 6304(d)(1)(E)?

"Secondly, where LEAA employees while participating in a ten month training program away from their permanent duty stations are not informed of the requirement to schedule annual leave in advance to be eligible for restoration, does this constitute 'administrative error' as provided in 5 U.S.C. § 6304(d)(1)(A)?"

The provision of law in question, 5 U.S.C. 6304(d)(1), was added to title 5 of the United States Code by subsection 3(2) of Public Law 93-181, approved December 14, 1973, 87 Stat. 705. It provides as follows:

"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."

The Civil Service Commission's implementing regulations and guidelines, issued pursuant to 5 U.S.C. 6304(d)(2) and 6311, are contained in the attachment to Federal Personnel Manual Letter No. 630-22, dated January 11, 1974. These regulations were also published in the Federal Register of January 11, 1974, and have been codified in subpart c, part 630, title 5, Code of Federal Regulations.

As to LEAA's first question - whether the scheduling of annual leave in advance by the employees in question was necessary to qualify for its restoration under 5 U.S.C. 6304(d)(1)(B) in the recited circumstances - we think the answer must be in the affirmative. Advance scheduling is a requirement imposed by the plain language of the law itself. This requirement is reiterated and amplified in the CSC regulation, 5 C.F.R. 630.308, which provides:

"Beginning with the 1974 leave year, before annual leave forfeited under section 6304 of title 5, United States Code, may be considered for restoration under that section, use of the annual leave must have been scheduled in writing before the start of the third bi-weekly pay period prior to the end of the leave year."

If, in spite of the foregoing, there should be any lingering doubt as to the mandatory nature of the scheduling requirement, it is dispelled by the legislative history of the law. See for example House of Representatives Report No. 93-456, 93d Congress, dated September 10, 1973, where it is stated in the second full paragraph on page 9:

"The committee intends that for purposes of complying with the 'scheduled in advance' requirement, some formal documentation will have to be furnished to show that the

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employee, a reasonable time before the end of the leave year, did, in fact, request a certain amount of annual leave in advance, that such request was approved by the appropriate authority, and that such annual leave was lost due to exigencies of the service or sickness of the employee."

Accordingly, we are of the opinion that statutory scheduling requirement may not be waived or modified even where extenuating circumstances may exist.

As to LEAA's second question - whether in the recited circumstances there was "administrative error" because of failure to inform the employees of the scheduling requirement so as to permit the restoration of the forfeited annual leave under 5 U.S.C. 6304(d)(1)(A) - we think the answer must be in the negative. Even if they have no actual knowledge, employees are charged with constructive knowledge of statutory requirements pertaining to them and of the implementing regulations authorized to be issued by statute. See B-173927, October 27, 1971, holding that employees are charged with constructive notice of and are bound by properly promulgated statutory regulations reducing per diem rates, even though their employing installations may not be aware of the changes and their travel orders may erroneously provide for the former higher rates.

Furthermore, the scheduling requirement is clearly set forth in paragraph 4.c. of LEAA's Instruction I 1590.3, referred to in the agency's letter. This internal document bears an issue date of October 17, 1974, some 5 weeks prior to November 24, 1974, the deadline for scheduling annual leave for the 1974 leave year. It states prominently on the first page that the Instruction is of interest to all current LEAA employees and it indicates that it is to be distributed to all LEAA employees. While it is not clear from LEAA's letter whether all of the five employees in question actually received this instruction, it is stated that one, Mr. Michael Dana who was administering the program in which the other four were participating, did in fact read it.

In view of the foregoing it is our opinion that the five employees in question do not qualify under the provisions of

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5 U.S.C. 6304(d)(1) for the restoration of annual leave forfeited
at the end of the 1974 leave year.

R. K. Miller
Deputy Comptroller General
of the United States