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Civ. Pers.

DECISION



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

FILE: B-188284

DATE: March 7, 1978

MATTER OF: William D. Norsworthy - Restoration
of Forfeited Annual Leave

DIGEST: IRS employee on August 26, 1975, submitted a Standard Form 71 application for annual leave which was denied by his supervisor due to an exigency of public business. Employee forfeited 152 hours of annual leave at close of 1975 leave year. Leave may be restored under 5 U.S.C. 6304(d)(1)(A) (Supp. III, 1973) because the employee timely requested the leave and the agency failed to approve and schedule the leave or present case to proper official for determination of a public exigency. This administrative error caused the loss of leave which, but for the error, could have been restored under 6304(d)(1)(B), as caused by exigencies of public business.

This responds to a request by the Director, Personnel Division, Internal Revenue Service (IRS), for an advance decision as to whether IRS may restore 152 hours of annual leave forfeited by Mr. William D. Norsworthy, an IRS employee, at the end of the 1975 leave year.

Mr. Norsworthy, Special Agent, Intelligence Division, Chicago District, was assigned to a high priority investigation throughout the 1975 leave year. On August 26, 1975, he submitted a Standard Form 71 (Application for Leave) requesting annual leave from September 2, 1975, through September 26, 1975, a period encompassing 152 hours. His request was denied by his group manager due to an exigency of the public service, namely, the need for timely completion of Mr. Norsworthy's investigation. An oral agreement was reached with his group manager that Mr. Norsworthy could take his leave upon completion of the investigation, which was expected to be in mid-October. However, the investigation was not completed until December 5, 1975, at which time Mr. Norsworthy orally requested leave for the remainder of December, a period encompassing only 136 hours.

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Although this request was orally granted, Mr. Norsworthy's supervisor cancelled the leave when a need for an additional review arose. Thus, Mr. Norsworthy had no opportunity to use 152 hours of excess leave which could not be carried into the 1976 leave year. As a result, he forfeited the 152 hours by operation of section 6304(c) of title 5, United States Code (1970).

On May 14, 1976, the question of whether Mr. Norsworthy's leave could be restored was first posed to the agency official authorized to determine an exigency of public business for the purpose of restoring leave forfeited by IRS employees in the Chicago District. That official, the IRS Midwest Regional Commissioner, denied the request because the matter was not presented to him for decision in advance of the cancellation of scheduled leave. After being asked to reconsider, the Midwest Regional Commissioner referred the case to the IRS Personnel Division by a memorandum dated January 3, 1977, which stated that in his opinion, after having made a thorough review of the facts in Mr. Norsworthy's case, this case "meets every requirement for restoration, except that the exigency of the service involved was, through management oversight, not determined by him." He stated further that if the case had been presented to him on a timely basis, he would have determined the exigency to be of such major importance as to permit restoration of leave. The Director of the Personnel Division is of the opinion that Mr. Norsworthy's leave should be restored to a special leave account for his use.

Forfeited annual leave can be restored under the limited circumstances set out in section 6304(d)(1) of title 5, United States Code (Supp. III, 1973), which provides:

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

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"(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 Federal Personnel Manual Letter (FPML) No. 630-22, dated January 11, 1974. The regulations, but not the guidelines, 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.

For restoration under subsections (B) or (C), there is a statutory requirement that the annual leave be scheduled in advance. See Matter of Michael Dana, 55 Comp. Gen. 470 (1977). Regarding this requirement, 5 C.F.R. 630.308 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 biweekly pay period prior to the end of the leave year." (Emphasis added.)

Paragraph 5c(3)(e) of the Attachment to FPML 630-22 further elaborates:

"* * * The scheduling and, as necessary, rescheduling of the annual leave must be in writing. (In this regard, Standard Form 71, Application for Leave, may be used to document the actions, supplemented as required.) Documentation must include the following:

" - The calendar date the leave was scheduled, i.e., approved by the official having authority to approve leave * * *." (Emphasis added.)

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The rule requiring approval in writing stems from the legislative history of section 6304(d)(1) itself:

"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 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." H. R. Rep. No. 93-456, 93rd Cong., 1st Sess. 9 (1973).

Since Mr. Norsworthy's annual leave was never approved in writing by his group manager, it was not scheduled in advance within the meaning of subsection 6304(d)(1)(B), and may not be restored under that subsection.

Congress intended that section 6304(d)(1) would authorize restoration of leave lost "through no fault of the employee," but would not authorize restoration of leave lost because the employee chose on his own volition not to use leave. Page 4 of H. R. Rep. No. 93-456, supra. Regarding leave lost due to exigencies or sickness, the statute places a modest burden, i.e., the scheduling requirement, upon the employee to prove that leave was not lost because he chose not to use it:

"To ease the administration of the above two provisions, the bill contains provisions that annual leave must have been scheduled in advance in order for the leave to be credited. This would be subject to Civil Service Commission regulations, and the committee feels that the regulations should be liberal. All that should be required is that the employee make a bona fide, formal, and timely request for leave and that the request be approved." Page 6 of H. R. Rep. No. 93-456, supra.

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In connection with the scheduling of leave subsection (1) of paragraph 5c of the Attachment to FPMR 630-22 reads in pertinent part:

" (1) Discussion. This particular provision recognizes and re-emphasizes management's long-standing responsibility for the planning and effective scheduling of annual leave for use through the leave year. While employees also have an obligation to request annual leave in a timely manner, failure on their part to do so does not relieve management of its responsibility to assure that the leave is in fact scheduled for use. When an employee chooses not to request or to use annual leave to avoid forfeiture, he is not entitled to have the forfeited leave restored for later use."

In view of the legislative history and implementing instructions, we construe subsections 6304(d)(1)(B) and (C) as creating a right to restoration of annual leave when it was lost because of a public exigency or sickness and was not lost due to the fault of the employee. Consequently, when an employee submits a "bona fide, formal, and timely request for leave," there can be no discretion whether to schedule the leave or not. The agency must approve and schedule 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. In the case of an exigency of public business the matter must be submitted to the designated official for his determination.

Failure on the part of the agency to properly schedule requested leave constitutes administrative error. Management can no more deny a proper leave request in derogation of the statutory right to restoration than it can fail to carry out written administrative regulations having mandatory effect for the purpose of counseling an employee in cases concerning retirement. See Matter of John J. Lynch, 55 Comp. Gen. 784 (1976).

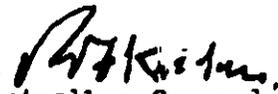
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Since subsection 6304(d)(1)(A) authorizes restoration of leave lost because of administrative error when the error "causes" the loss, if an employee demonstrates that, but for an administrative error in failing to schedule leave, he would be entitled to restoration of leave under subsection 6304(d)(1)(B), then such leave may be restored under subsection 6304(d)(1)(A).

In Mr. Norsworthy's case, the record shows that he submitted a proper, written leave request which was summarily denied by his group manager due to an exigency of public business. The group manager orally agreed upon leave at another date, but failed to schedule it in writing or submit the question of whether a public exigency existed to the proper official. Having submitted a timely written request, Mr. Norsworthy sufficiently documented his effort to take leave during the existence of a particular exigency. Since that same exigency lasted throughout the 1975 leave year, and since the Midwest Regional Commissioner has already determined the existence of such an exigency as to require forfeiture of leave, we have no objection to restoration in Mr. Norsworthy's case.

Accordingly, pursuant to title 5, United States Code, section 6304(d)(1)(A), IRS may restore Mr. Norsworthy's 152 hours of forfeited leave and credit it to a special account for his use.

Deputy


Comptroller General
of the United States