

DECISION



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

personal name

10,290

FILE: B-193567

DATE: May 24, 1979

MATTER OF: Dr. W. Newlin Hewson - [Restoration of Leave]

DIGEST:(1) Employee did not schedule leave in advance as required by 5 C.F.R. § 630.308. He forfeited annual leave due to exigencies of the public business and may not have it restored under 5 U.S.C. § 6304(d)(1) (B) as the leave was not scheduled in advance within the meaning of subsection (B). The statutory scheduling requirement may not be waived or modified even where extenuating circumstances may exist.

(2) In the absence of an agency regulation requiring the counseling of an employee with regard to forfeiture of leave, the failure to advise the employee of the scheduling requirement for the restoration of leave under 5 U.S.C. § 6304(d) (1)(B) is not administrative error under subsection (A). Employees are charged with constructive knowledge of statutory requirements pertaining to them and of implementing regulations issued pursuant to statute.

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By letter dated October 18, 1978, Dr. W. Newlin Hewson, an employee of the Department of Housing and Urban Development, appealed the disallowance of our Claims Division of his claim for the restoration of 93 hours of annual leave forfeited at the close of the 1976 leave year.

The record shows that on December 13, 1976, Dr. Hewson requested in writing 93 hours of annual leave which were in excess of his maximum permissible carryover under 5 U.S.C. § 6304(a). His Branch Chief immediately denied the leave request because he wanted Dr. Hewson to participate in a work project. Dr. Hewson then upon the advice of the Branch Chief requested that the 93 hours of annual leave be restored.

A memorandum of November 19, 1976, from the Assistant Secretary for Housing, Federal Housing Commissioner,

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provided that employees who, because of operational requirements would not be able to use their accrued annual leave prior to December 31, 1976, could have the leave restored provided, among other conditions, that the employee had submitted his leave plans in writing prior to November 26, 1976. The Acting Director, Office of Management, requested that the advance scheduling requirement be waived since Dr. Hewson's Branch Chief had not received the November 19, 1976 memorandum in time to advise his employees to schedule their leave in writing by November 26, 1976. The Acting Assistant Secretary for Housing, approved the recommendation; however, the agency Personnel Systems and Payroll Division was unable to restore the leave since it was scheduled after the regulatory deadline.

Forfeited annual leave can be restored under the limited circumstances set out in section 6304(d)(1) of title 5, United States Code (1976) which provides:

"(d)(1) 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

"(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, are set forth in Federal Personnel Manual Letter No. 630-22, dated January 11, 1974. The regulations, but not the guidelines have been codified in Subpart C, Part 630, title 5, Code of Federal Regulations. 5 C.F.R. § 630.308 provides that before annual leave forfeited under section 6304, may be considered for restoration under that section, use of annual leave must have been scheduled

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in writing before the start of the third biweekly pay period prior to the end of the leave year.

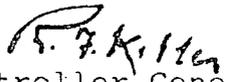
On September 28, 1978, our Claims Division upheld the agency's denial of Dr. Hewson's claim on the basis that he did not schedule his use of annual leave in advance as required by the applicable law and regulations.

Dr. Hewson appealed the Claims Division action urging that his required presence at work arose as an emergency which precluded leave planning. He states he was never advised that advance paperwork was necessary to save his leave.

The statutory scheduling requirement may not be waived or modified even where extenuating circumstances may exist. Matter of Michael Dana 56 Comp. Gen. 470 (1977). The express provision in 5 C.F.R. § 630.308 requiring the advance scheduling of leave in writing, precludes restoring the forfeited annual leave under subsection 6304(d)(1)(B).

The failure of an agency to advise an employee of the scheduling requirement of subsections (B) and (C) does not constitute administrative error under subsection (A) as employees are charged with constructive knowledge of statutory requirements pertaining to them and the implementing regulations. Dana, supra. An exception to the general rule could arise where the agency has a written regulation requiring that employees be counseled in these situations concerning a possible forfeiture of annual leave. See Matter of John J. Lynch, 55 Comp. Gen. 784 (1976). A review of the record, including the Assistant Secretary's memorandum of November 19, 1976, fails to show any such regulation.

Accordingly, the Claim's Division's disallowance of Dr. Hewson's claim for the restoration of leave pursuant to 5 U.S.C. § 6304(d)(1) is affirmed.


Deputy Comptroller General
of the United States