

DECISION



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

FILE: B-218728

DATE: December 10, 1985

MATTER OF: Bruce F. Scott - Restoration of Forfeited Annual Leave

DIGEST:

An employee sustained a compensable on-the-job injury resulting in a prolonged recuperation period which extended beyond the end of the leave year. Following his injury and with the knowledge that he probably would be unable to use 44 hours of annual leave subject to forfeiture, the employee timely scheduled its use in compliance with 5 C.F.R. § 630.308. The agency denied restoration of the annual leave on the basis that scheduling must be done before an injury occurs in order to have it restored. We have ruled in prolonged recuperation cases that if there was no opportunity to schedule leave because of illness, such leave may be presumed to have been timely scheduled for the purposes of restoration. The fact that the employee scheduled the annual leave after the injury would not alter that result since Congress rejected the view that an employee should be required to use annual leave while he is sick in order to avoid its loss.

This decision is in response to a request from the Director of Personnel Management, Forest Service, Department of Agriculture. The issue is whether a Forest Service employee is entitled to have forfeited annual leave restored to his account. We hold that the employee may have such leave restored for the following reasons.

FACTS

The employee, Mr. Bruce F. Scott, was involved in a motorcycle accident on September 24, 1984, incident to his employment. As a result of the on-the-job injury, he

was placed in a continuation of pay status beginning September 25, 1984. On November 5, 1984, pursuant to regulations, Mr. Scott scheduled in writing the use of 44 hours of annual leave which was subject to forfeiture at the close of the 1984 leave year.

On November 9, 1984, he was awarded and began receiving workers' compensation from the Office of Workers' Compensation Programs (OWCP), Department of Labor, and continued in that compensation status through January 20, 1985. Because of the compensation award, he did not use the scheduled leave before the end of the leave year. As a result, he forfeited that leave.

The submitting official appears to be of the opinion that the forfeited leave should be restored based on our decision Robert T. Good, B-182608, February 19, 1976. However, uncertainty is expressed because of the timing of Mr. Scott's scheduling request.

The questions raised are:

1. Must an employee schedule use of annual leave prior to an injury or illness in order to avoid forfeiture of leave?
2. Should the claimant have used the scheduled annual leave to avoid forfeiture even though he was covered by workers' compensation during the same period?

DECISION

The law governing restoration of forfeited annual leave is contained in 5 U.S.C. § 6304 (1982). Subsection 6304(d)(1)(C) provides in part:

"(d)(1) Annual leave which is lost by operation of this section because of--

* * * * *

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

shall be restored to the employee."

In Leonard J. Milewski, 63 Comp. Gen. 180 (1984), we ruled that an employee was entitled to have his annual leave restored where he sustained a work-related injury which resulted in a prolonged period of recuperation preceding the end of a leave year. Further, we stated in Robert T. Good, B-182608, supra, that the intent of the law is to permit an employee who becomes ill during or prior to the use of scheduled annual leave to use that leave at a later date. We stated further that:

"* * * The same basic consideration applies in the case of an employee whose use of annual leave is precluded by an injury or sickness otherwise chargeable to his sick leave account as in the case of an employee who, pursuant to legislation, is not charged for an absence which is attributable to an injury or disease resulting from the performance of duty. In neither event is the employee able to avail himself of annual leave for its intended purpose of allowing the employee time for a vacation and personal business without loss of pay."

The concept behind our rulings is the recognition that illnesses, injuries and prolonged periods of recuperation which may accompany them, are matters beyond the control of the employee.

Mr. Scott timely scheduled the use of his annual leave subject to forfeiture, thus complying with the scheduling requirement in 5 C.F.R. § 630.308 (1984). Even though he scheduled his leave after the injury occurred, and in anticipation of the probability that he would not be able to use it before the end of the leave year, that does not alter the applicability of the ruling in Milewski and Good. The annual leave in question was his to use for his own purpose, which purpose was prevented by the unanticipated occurrence of his job connected injury and his prolonged period of recuperation.

Therefore, it is our view that even though the injury occurred prior to his actual leave scheduling, the timing does not operate to deprive him from scheduling his annual

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leave at a later date. The first question is answered accordingly, and the Forest Service may restore the 44 hours of leave subject to forfeiture to Mr. Scott's leave account in the manner authorized by 5 U.S.C. § 6304(d)(2) (1982), and 5 C.F.R. § 630.306 (1984).

The agency also questions whether Mr. Scott should have used the scheduled annual leave to avoid forfeiture during the period he was covered by workers' compensation. The answer to this is in the negative since we believe that this case is analogous to our holding in 58 Comp. Gen. 435 (1979). We held in that case that an employee who was on extended sick leave pending disability retirement was entitled to have his forfeited annual leave restored under 5 U.S.C. § 6304d(1)(C), even though it was scheduled. The rationale for our holding was the same as in the Good case since we specifically stated in 58 Comp. Gen. at 437 that "the legislative history shows that Congress specifically rejected the view that an employee should be required to use annual leave while he is sick in order to avoid loss of annual leave."

for 
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