



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Anthony J. Calio - Restoration of Annual and Sick Leave

File: B-226638

Date: September 23, 1987

DIGEST

An agency failed to advise a career Senior Executive Service (SES) member prior to receiving a Presidential appointment to a Executive Level IV position that he could elect to continue receiving annual and sick leave or other SES benefits during his Presidential appointment, as provided in 5 U.S.C. § 3392(c) (1982). As a result of the agency's failure to properly counsel the employee, the employee placed his annual and sick leave balance in abeyance and did not elect to retain leave benefits for a period of 4 years. We conclude that the agency's failure to properly advise the employee constituted an unwarranted personnel action and that the annual and sick leave the employee would have earned during this period may be retroactively restored.

DECISION

Mr. John M. Golden, Director for Personnel and Civil Rights, Department of Commerce, requests our opinion whether annual and sick leave may be credited to a career Senior Executive Service (SES) member during the period he served in a Presidential appointment. We hold that this annual and sick leave may be restored under the Back Pay Act because the agency's failure to properly advise the employee of his option to retain certain SES benefits, including leave, while serving under a Presidential appointment constituted an unwarranted personnel action.

BACKGROUND

According to the request submitted by the Department of Commerce, Mr. Anthony J. Calio was a career SES member at the National Aeronautical and Space Administration who, on December 20, 1981, received a Presidential appointment to the Executive Level IV position of Deputy Administrator of the National Oceanic and Atmospheric Administration (NOAA). The NOAA Personnel Office processed Mr. Calio's new

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appointment, but no personnel official explained the election available to him under the provisions of 5 U.S.C. § 3392(c) (1982) upon his conversion from a career SES position to a Presidential appointment confirmed by the Senate. Section 3392(c) states as follows:

"(c) If a career appointee is appointed by the President, by and with the advice and consent of the Senate, to a civilian position in the executive branch which is not in the Senior Executive Service, and the rate of basic pay payable for which is equal to or greater than the rate payable for level V of the Executive Schedule, the career appointee may elect (at such time and in such manner as the Office may prescribe) to continue to have the provisions of this title relating to basic pay, performance awards, awarding of ranks, severance pay, leave, and retirement apply as if the career appointee remained in the Senior Executive Service position from which he was appointed. Such provisions shall apply in lieu of the provisions which would otherwise apply--

"(1) to the extent provided under regulations prescribed by the Office, and

"(2) so long as the appointee continues to serve under such Presidential appointment."

Although this statutory provision was contained in the Civil Service Reform Act of 1978, Public Law 95-454, 92 Stat. 1161 (1978), the Office of Personnel Management (OPM) did not publish proposed regulations to implement this provision until July 12, 1983, 48 Fed. Reg. 31,862. Final regulations were issued on February 14, 1985, 50 Fed. Reg. 6,153 (codified in 5 C.F.R. Part 317, Subpart H), and these regulations were also published in the Federal Personnel Manual (FPM) Bulletin 920-75, March 5, 1985. The regulations provide that, at the time of appointment and at 12-month intervals thereafter, career appointees may elect to retain or drop the SES benefits specified in the statute.

The report from Commerce states that several months after the issuance of FPM Bulletin 920-75 in 1985, the personnel office conducted a full counseling session with Mr. Calio concerning his options under the statute. He elected to earn and use annual and sick leave, and his election became effective January 17, 1986.

The agency questions whether the annual and sick leave Mr. Calio would have earned from the date of his Presidential appointment, December 20, 1981, to the date of his election under the statute, January 17, 1986, may be restored. The agency states that as of the date of his Presidential appointment, Mr. Calio had an annual leave balance of 454 hours and a sick leave balance of 1342 hours. Officers serving under Presidential appointment do not accrue or use annual or sick leave. See e.g. B-123698, May 10, 1978. Thus, Mr. Calio's leave balances were held in abeyance.

The agency further states that Mr. Calio would have earned 860 hours of annual leave and 428 hours of sick leave during this 4-year period, and, based on available records and Mr. Calio's appointment calendars, he would have used 292 hours of annual leave and 84 hours of sick leave during this period. Commerce asks whether the balance of leave (568 hours of annual leave and 344 hours of sick leave) may be credited to Mr. Calio since the agency failed to properly counsel him regarding his election of SES benefits.

OPINION

Commerce suggests that Mr. Calio suffered an unjustified or unwarranted personnel action as defined by the Back Pay Act, 5 U.S.C. § 5596 (1982), which would entitle him to restoration of this annual and sick leave. In our decisions involving the Back Pay Act we have recognized as unjustified and unwarranted actions, clerical or administrative errors that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively.

See Douglas C. Butler, 58 Comp. Gen. 51 (1978). In addition, we have previously held that an unjustified personnel action may involve acts of omission as well as commission. See 54 Comp. Gen. 1071 (1975). Therefore, under the Back Pay Act, an agency may retroactively grant backpay, allowances, and differentials to an employee where he has undergone an unjustified or unwarranted personnel action, even though such action was one of omission rather than one of commission. 54 Comp. Gen. 1071, 1074. See also 5 C.F.R. § 550.803 (1987).

We believe that NOAA committed an unwarranted or unjustified personnel action when it failed to counsel or advise Mr. Calio that he could elect to continue to have leave and other SES benefits apply at the time he received his Presidential appointment. The failure to counsel deprived him of his right granted by statute to retain annual and sick leave benefits, and thus constitutes an unwarranted or unjustified personnel action under 5 U.S.C. § 5596.

We note that at the time of Mr. Calio's appointment, December 20, 1981, OPM had not yet published regulations to implement 5 U.S.C. § 3392(c) as required in the statute. However, we have been informally advised by OPM that during the period from 1978 to 1983 OPM instructed agencies to implement the authority of 5 U.S.C. § 3392(c) and allow individuals to make elections even though formal regulations had not yet been issued. We understand that the Department of Commerce received such an instruction in 1980 regarding another of its SES members who received a Presidential appointment.

Thus, in OPM's view, the authority to make an election concerning leave benefits existed at the time of Mr. Calio's appointment under the authority of 5 U.S.C. § 3392(c) regardless of the fact that OPM had not yet issued regulations. Therefore, Mr. Calio should have been advised of his options under the statute.

Accordingly, we hold that the annual and sick leave Mr. Calio was entitled to earn for this period should be

restored to his leave account, less the amount of leave he would have used during this period.

ja *Harry R. Van Cleave*
Comptroller General
of the United States