



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dr. James A. Majeski--Restoration of
forfeited annual leave.

File: B-247196

Date: April 13, 1992

DIGEST

An employee failed to use restored forfeited leave within the required 2-year period and the leave again was forfeited. Although the employee alleges that the agency erred in advising him regarding the rules for using restored leave, the leave may not be restored again. The 2-year requirement, which is contained in a regulation issued by OPM, has the force and effect of law and may not be waived or modified by this Office. 5 C.F.R. § 630.306 (1991).

DECISION

Dr. James A. Majeski appeals our Claims Group settlement¹ denying his claim to have 91-1/2 hours of forfeited annual leave restored to his credit. For the reasons stated below, we affirm the Claims Group's settlement.

Dr. Majeski is a surgeon at the Veterans Administration (VA) Hospital in Charleston, South Carolina. In 1986, the VA restored 91-1/2 hours of annual leave to Dr. Majeski that had been forfeited at the end of the 1985 leave year. However, he did not use the restored leave within the required 2-year period, and the leave again was forfeited.

Dr. Majeski alleges that the VA failed to properly counsel him regarding the requirement that the restored leave be used within the 2-year period. He further alleges that the agency took annual leave used during the 2-year period from his regular accrued leave instead of the account containing his restored leave. In response, the agency notes that when Dr. Majeski first sought to have the leave restored in 1985, he requested to have it restored for use in 1986, well within the 2-year requirement. The agency states that the leave was restored to a separate account for use within the prescribed 2-year period. Further, the agency contends that if there was an error regarding the charging of annual leave, this would have been reflected on Dr. Majeski's

¹2-2862430, Nov. 6, 1991.

Earnings and Leave statements for the 2-year period which showed his restored leave balance, and any error should have been observed and questioned.

The statutory authority to restore forfeited annual leave is found at 5 U.S.C. § 6304(d) (1988).² The statute provides that restored leave shall be credited to a separate account for the employee and shall be available for use within the time limits prescribed by regulations of the Office of Personnel Management (OPM). Pursuant to this authority, OPM's regulations require that employees use restored leave within 2 years. 5 C.F.R. § 630.306 (1991).

In its guidance on the application of this regulation when it was initially issued, the Civil Service Commission (now OPM) pointed out that the law provides only for the temporary restoration of forfeited leave, and there is no authority to permit its retention if it is not used within the specified 2 years. That is, "any restored leave unused at the expiration of the two-year limit is again forfeited with no further right to restoration." FPM Letter No. 630-22, Jan. 11, 1974, Attachment.

Because OPM issued its regulation pursuant to its statutory authority in 5 U.S.C. § 6304(d)(2), it has the force and effect of law and may not be waived or modified by this Office. William Corcoran, B-213380, Aug. 20, 1984. Therefore, we have strictly applied the 2-year limit. For example, in Patrick J. Quinlan, B-188993, Dec. 12, 1977, we held that forfeited restored leave may not be restored a second time even though the agency failed to maintain a separate account as required by governing law and regulation. Evidence of extenuating circumstances which prevented the employee from using the restored leave within the 2-year period is not a basis for further restoration. Likewise, we have held that the fact that an employee may not have been advised or was given erroneous information about the 2-year limit does not provide a legal basis for further restoration. William Corcoran, B-213380, supra.

The only exception to this rule we have recognized is where the agency erred in charging an employee's regular leave

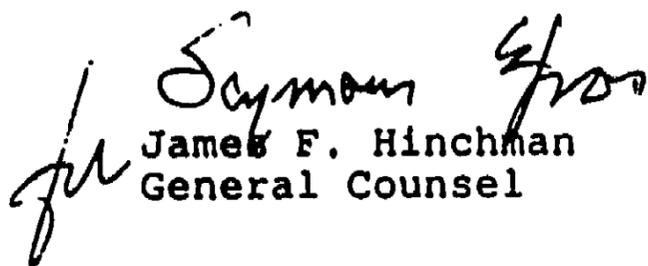
²As a part-time physician for the VA, Dr. Majeski is not directly covered by the provisions of 5 U.S.C. § 6304. However, by regulation, the VA has extended the forfeited leave restoration provisions of section 6304 and implementing directives to its employees in Dr. Majeski's category. See VA Regulation MP-5, Part II, Chapter 7, § 4b (Change 1, November 22, 1983), promulgated pursuant to the authority of 38 U.S.C. § 4108 (1982) (now codified at 38 U.S.C. § 7421).

account instead of his restored account, contrary to his specific instructions and where no separate category appeared on his pay statement to reflect the restored hours. See Robert D. McFarren, 56 Comp. Gen. 1014 (1977).

Dr. Majeski states that he was not informed of the requirement to use the leave within the 2-year period and the timekeeper charged the leave he took to his current leave rather than his restored leave account. However, as noted above, the agency states that the leave was originally restored on the basis that Dr. Majeski intended to use it in 1986, and he was provided earnings and leave statements showing his restored leave balance.

In these circumstances Dr. Majeski should have been aware that his restored leave balance was not being charged for leave used, and he should have brought the matter to the agency's attention so the guidelines for the use of such leave could be clarified for him. We note that there is no requirement that the restored leave account automatically be charged first, and in some cases the employee may find it advantageous to charge current leave first, such as where it is near the end of the year and he has excess current leave to use or lose. In any event that is generally for the employee to elect, and that is one of the reasons his restored leave is placed in a separate account, the status of which is shown on his pay statements. Thus, the facts of Dr. Majeski's case differ substantially from those in the McFarren case, where the agency disregarded the employee's specific instruction as to which leave account to charge and did not provide a separate category on his pay statements showing his restored leave balance. Therefore, the limited exception in that case is not applicable to Dr. Majeski's case.

Accordingly, the agency's determination that Dr. Majeski's forfeited restored leave may not be restored again was correct.


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General Counsel