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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Office of Independent Counsel - Restoration of Forfeited Annual Leave

File: B-252501

Date: June 24, 1993

DIGEST

1. Where the former Office Administrator for an Independent Counsel failed to accept requests for the scheduling of annual leave and inconsistently handled excess annual leave in the employees' leave accounts, we conclude that leave in excess of the 240-hour ceiling may be restored on the basis of administrative error under the provisions of 5 U.S.C. § 6304(d)(1)(A).

2. Employees of an Independent Counsel who were appointed as temporary or intermittent employees would generally not be entitled to severance pay. However, temporary employees who commenced work within 3 days after separation from an appointment that would entitle them to severance pay may receive severance pay, provided they have been employed for a continuous period of 12 months and are involuntarily terminated. Wanda Pleasant, 67 Comp. Gen. 300 (1988).

3. Under 5 U.S.C. § 5545(a), an employee who is regularly scheduled to perform "night work," that is work between 6 p.m. and 6 a.m., is entitled to a 10 percent differential. Therefore, an employee whose work schedule each day included 4 hours of night work is entitled to the differential for these hours.

DECISION

We have been asked three questions concerning certain employees of the Office of Independent Counsel Lawrence E. Walsh (Office), as follows: (1) whether annual leave which was forfeited in various years from 1987 until 1992 may be restored; (2) whether severance pay may be paid to any of the employees of the Office; and (3) whether employees of the Office may receive night differential pay.

As explained below, we conclude that because of agency error 10 employees of the Office who forfeited annual leave may have their annual leave restored. Additionally, certain employees may be entitled to receive severance pay and night differential pay.

Annual Leave Restoration

The first issue is whether 10 employees of the Office of Independent Counsel Walsh serving under temporary appointments who accrued and accumulated more that 240 hours of annual leave at the end of a leave year must forfeit that excess leave or may have the forfeited leave restored. The report from the Office Administrator states that the former Office Administrator, who maintained the leave accounts for these employees, erroneously advised them that (1) the statutory limit of 240 hours did not apply to them and (2) it would be financially advantageous to the employees to use compensatory time before using annual leave because when the Office closed, employees could only be paid for accrued annual leave and not compensatory time.

Several employees attempted to schedule the use of annual leave to avoid forfeiture, but according to their statements the former Office Administrator either refused to accept documents requesting that leave be scheduled or he accepted the documents but took no action to either approve or deny the requests for annual leave. Most of the annual leave was not used due to the demands of investigations and trial schedules.

The former Office Administrator also acted inconsistently in handling the excess annual leave in these employees' accounts. In some instances, he carried over an annual leave balance in excess of 240 hours for an employee's leave account while in other instances he limited the carryover amount to 240 hours and made a notation of excess leave.

The current Office Administrator asks whether these 10 employees may be credited with all accrued and accumulated annual leave which might otherwise be forfeited.

In our report on the expenditures of Independent Counsels who were appointed under 28 U.S.C. §§ 591-599 (1988), we concluded that the Independent Counsels and their employees are governed by the laws and regulations applicable to other executive branch officers and employees contained in Title 5 of the United States Code, relating to pay, allowances, and other benefits and entitlements.[1]

Annual leave in excess of the limits provided in 5 U.S.C. § 6304 (a)-(c) shall be forfeited at the beginning of the first full biweekly pay period each year. However,

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[1]FINANCIAL AUDIT: Expenditures by Nine Independent Counsels, GAO/AFMD-93-1, Oct. 9, 1992; see also FINANCIAL AUDIT: Expenditures by Three Independent Counsels, GAO/AFMD 93-60, Apr. 21, 1993.

subsection 6304(d)(1) provides for restoration of annual leave lost by the operation of that section because of:

> "(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;
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> "(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 . . . ."

The basis for considering restoration of leave to these 10 employees is "administrative error" since, as noted above, the actions of the former Office Administrator frustrated their attempts to schedule the use of annual leave as contemplated by the statute.

We have not precisely defined the term "administrative error," but we have described several situations which we would view as supporting a determination of administrative error under this statute. For example, in view of an agency's responsibility for maintaining accurate retirement records and counseling employees concerning their retirement rights and obligations, we have stated that an agency's failure to provide an employee with correct advice concerning retirement would constitute an administrative error for purposes of the leave statute. See John J. Lynch, 55 Comp. Gen. 784 (1976). See also Carr and Seach, B-222221, Sep. 8, 1986, in which we extended this rule to an agency's misinterpretation of a court case regarding mandatory retirement which led to certain employees forfeiting leave.

Here, the actions of the former Office Administrator, described above, made it impossible for the employees to take appropriate steps to schedule annual leave and avoid forfeiture if the leave could not be used due to the exigencies of public business. We conclude, therefore, that such actions constituted administrative error for purposes of restoring forfeited annual leave under 5 U.S.C. § 6304(d)(1)(A). See Isidro R. Yatar, B-201358, Aug. 24, 1981, where we allowed an employee to have restored all leave in excess of 240 hours (30 days) that he forfeited because the agency misinterpreted the law applicable to the appointment of an employee and thought that the employee was entitled to carry over 360 hours (45 days) a year.

Our review of the claims of the 10 employees[3] and their leave records as maintained by the Office revealed numerous mathematical and other errors. Therefore, each record must be reviewed by the Office before leave is restored. In this regard, the leave being restored must be placed in a special account and the employee has until the end of the leave year 2 years after the leave is restored to use the leave, or it is permanently forfeited. Patrick J. Quinlan, B-188993, Dec. 12, 1977, 5 C.F.R. § 630.306 (1993). Of course, if the employee has already terminated or terminates before the end of the time for use of the restored leave, the employee may receive payment for the restored leave as part of his or her accrued leave settlement.

Severance Pay

The next issue is whether employees of the Office are entitled to severance pay, an entitlement available for executive branch employees under the provisions of 5 U.S.C. § 5595 (1988).

All of the employees at the Office receive either an appointment as an intermittent (when actually employed) employee with no set schedule or as a temporary employee with a time duration of a year and a day. Generally these type of appointments do not provide employees entitlement to severance pay. See 5 U.S.C. § 5595 and 5 C.F.R. §§ 550.701-713.

An intermittent employee is expressly denied severance pay under 5 C.F.R. § 550.703. For a temporary employee, the situation is the same except for an employee who commences work on a temporary basis within 3 days after separation from an appointment that would entitle an individual to severance pay, such as a full-time career appointment with a federal agency. Under those circumstances, the employee is entitled to severance pay. See 5 U.S.C. §§ 5595(a)(2)(ii) and 5595(b); 5 C.F.R. § 550.703(h). Therefore, employees of the Office who transferred from another federal agency would be entitled to severance pay if they (1) have been employed for a continuous period of at least 12 months and (2) are involuntarily terminated. It does not matter that the employees knew when they accepted a position that the position would eventually result in their termination. See Wanda Pleasant, 67 Comp. Gen. 300 (1988).

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[3]The employees are (1) Kathleen A. Betts, (2) Joyce J. Blakely, (3) Linda Dahl, (4) Jacob D. Kortz, (5) James Simmons, (6) Dolores E. Singleton, (7) Allen F. Stansbury, (8) Denise E. Washington, (9) Ruth A. Witucki, and (10) Barbara S. Zelenko.

Night Differential

Finally, the Office Administrator asks whether the employees of the Office whose regularly scheduled work was between the hours of 2 p.m. and 10 p.m. daily are entitled to night differential pay under 5 U.S.C. § 5545.

Under 5 U.S.C. § 5545(a), an employee is entitled to receive his or her basic pay and a 10 percent differential for all "night work," that is, regularly scheduled work between the hours of 6 p.m. and 6 a.m., that he or she performs. See also 5 C.F.R. §§ 550.121 and 550.122 (1993). Therefore, for each day that the employee was regularly scheduled to work between 2 p.m. and 10 p.m., he or she is entitled to a night differential for the 4 hours of night work. See 59 Comp. Gen. 101, 102 (1979). See also James Barber, 63 Comp. Gen. 316, 319-320 (1984).

for Comptroller General
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