

DECISION



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

9926

FILE: B-182608

DATE: April 23, 1979

[Request for Restoration of]
MATTER OF: Forfeiture of Annual Leave

DIGEST Employee scheduled use of annual leave which was subject to forfeiture prior to his retirement. However, he did not use scheduled annual leave as he was on extended sick leave pending disability retirement. Forfeited leave may be restored under 5 U.S.C. § 6304(d)(1)(C), since neither statutory language nor legislative history indicates that annual leave which is not used as result of extended sick leave pending disability retirement may not be restored under 5 U.S.C. § 6304(d)(1)(C).

AGC 00022
AGC 00026

By letter dated September 13, 1978, Mr. Thomas S. McFee, Assistant Secretary for Personnel Administration, Department of Health, Education, and Welfare (HEW) has requested an advance decision as to whether an employee of the Social Security Administration (SSA) may be restored forfeited annual leave under 5 U.S.C. § 6304(d)(1)(C) where such leave was scheduled pending the effective date of the employee's approved disability retirement.

AGC 00013

In the case presented, the Civil Service Commission (Commission) approved the disability retirement application of the employee on October 27, 1976. Subsequently, on November 15, 1976, the employee began a period of approved sick leave prior to his disability retirement which was not to be effective until more than a year later, i.e. January 17, 1978. The agency counseled the employee to schedule in advance the annual leave he would earn during the 1977 leave year in order to avoid forfeiture of accrued annual leave in excess of the maximum permissible carryover under 5 U.S.C. § 6304(a). This was accomplished on November 17, 1976. After the employee retired he filed a claim for the restoration of the scheduled 208 hours of annual leave which he had forfeited.

Forfeited annual leave can be restored under the circumstances set forth in 5 U.S.C. § 6304(d)(1) as added by section 3 of Public Law 93-181, December 14, 1973, 87 Stat. 705 which provides:

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"(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 Commission has issued implementing regulations and guidelines pursuant to 5 U.S.C. § 6304(d)(2) and 6311, which appear in Federal Personnel Manual Letter 630-22, January 11, 1974. The regulations, but not the guidelines, have been codified in Subpart C, Part 630, Title 5, Code of Federal Regulations. Concerning the scheduling in advance requirement the Commission's regulation at 5 C.F.R. 630.308 provides as follows:

"Beginning with the 1974 leave year, before annual leave forfeited under section 6304 of title 5, United States Code, may be considered for restoration under that section, use of the annual leave must have been scheduled in writing before the start of the third biweekly pay period prior to the end of the leave year."

Agency officials authorized to restore annual leave under subsection 6304(d)(1)(C) questioned the propriety of restoring the leave since it was known in advance that the employee would not be able to use it. Accordingly, the agency requested an opinion from the Commission as to the appropriateness of restoring forfeited leave under subsection 6304(d)(1)(C) where the employee knew prior to his scheduling the leave in advance that his disability retirement had been approved.

On May 16, 1978, the Chief of the Commissions Pay and Policy Division, Bureau of Policy and Standards, advised the HEW that

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in his opinion it was not appropriate to restore to the employee the forfeited annual leave under subsection 6304(d)(1)(C). The opinion is in part as follows:

"* * * The guidance issued for the implementation of P.L. 93-181 contained in FPM Letter 630-22 states on page 7:

"'Sickness, i.e., a medical or physical condition for which a grant of sick leave would be approved, is not in itself a basis for permitting annual leave to be forfeited and subsequently restored for later use. Management still has the responsibility to schedule or reschedule the use of annual leave to avoid forfeiture even though an absence period because of sick leave occurs during the year. This is especially true where it is known in advance that a medical or physical condition will require an absence prior to the end of the leave year.'

"Inasmuch as the Social Security Administration had foreknowledge of the employee's pending disability retirement at the time the annual leave was scheduled, it is apparent that the annual leave was not scheduled to avoid forfeiture, as required under FPM Letter 630-22. Use of the annual leave in 1977 was not precluded as a result of illness, as the employee had the option of substituting annual leave for sick leave at any time. Absent any other relevant circumstances, restoration of the forfeited annual leave is not warranted."

However, the Commission advised the HEW that the forfeiture of annual leave in this situation may have been the result of administrative error if written agency regulations required counseling the employee with regard to the forfeiture of annual leave and the employee was erroneously advised to forfeit the annual leave and apply for restoration. In view of its administrative regulation requiring the counseling of employees with regard to the restoration of leave the agency held that the annual leave was forfeited due to administrative error and restored the leave to the employee under subsection 6304(d)(1)(A). The HEW now asks us to determine the proper basis on which the employee's forfeited leave may be restored.

We believe that the Commission has adopted a restrictive view of the scheduling requirement of subsection 6304(d)(1)(C) which is not required by either the statutory language or legislative history.

The legislative history shows that Congress intended that section 6304(d)(1) would authorize the restoration of leave lost through no fault of the employee. There was concern that an employee should not be able to carry over additional leave on his own volition. H.R. Rep. No. 93-456, 93rd Cong. 1st Sess. 4 (1973). Accordingly, the Congress provided that annual leave should be scheduled in advance if it was to be restored under that provision. Page 6 of H.R. Rep. No. 93-456, supra.

With regard to the Commission's view that the employee involved here had the option of substituting annual leave for sick leave, 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. On page 5 of H.R. Rep. No. 93-456, it is stated that such view ignored the basic purpose of annual leave, which is to give an employee time for vacation or other purposes not related to illness.

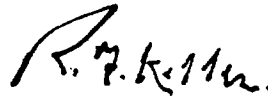
We note further, that by section 1 of Public Law 93-181, supra, Congress amended 5 U.S.C. § 5551 to authorize a lump-sum payment for all of the annual leave standing to the credit of an employee at the time of his separation from the service. Previously, such lump-sum payment was limited to 30 days of annual leave or the number of days of annual leave carried over to the employee's credit at the beginning of the leave year in which the entitlement to payment occurred, whichever was the greater. The Congress intended that this removal of the prior restrictions on lump-sum compensation for annual leave would eliminate situations where an employee would take an extended period of annual leave just prior to the date of separation from Government service. Congress perceived that such use of annual leave just prior to an employee's separation had resulted in administrative difficulties as a position vacancy is not created until an employee is actually off the agency's rolls. See page 6 of H.R. Rep. 93-456, supra.

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It would appear incongruous with that intent of Congress to construe the leave restoration provisions of section 3 of Pub. L. 93-181, section 6304(d)(1) (C) so narrowly as to preclude the restoration of annual leave scheduled by an employee who is on extended sick leave pending disability retirement. To require such an employee to interrupt his use of sick leave in order to use annual leave to avoid forfeiture thereof under 6304(a) would extend the length of time such an employee would remain on the agency's rolls prior to his retirement, a situation which the Congress has considered to be undesirable.

In view of the above, it is our belief that forfeited annual leave may be restored under 5 U.S.C. § 6304(d)(1)(C) where such leave has been scheduled in advance in accordance with 5 C.F.R. 630.308, notwithstanding such leave may have been scheduled subsequent to the approval of the employee's disability retirement. Regarding the scheduling requirement as it applies to cases in which the employee is on extended sick leave at the end of a leave year, compare Matter of Robert T. Good, B-182608, February 19, 1976.

In accordance with the above, as the record indicates that the employee in question properly scheduled his annual leave which was subject to forfeiture, the agency may properly restore such leave pursuant to 5 U.S.C. § 6304(d)(1)(C).



Deputy Comptroller General
of the United States