

4904
DECISION



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

Div. Per.
I. K. Kishman

FILE: B-190263

DATE: July 5, 1978

MATTER OF: Gerard W. Caprio - Restoration of
Forfeited Annual Leave

DIGEST: HUD employee, who while on sick leave during sustained illness, requested in writing on October 23, 1976, that his excess annual leave be "carried-over" into next leave year. Such a request was not administratively acted upon and such excess annual leave was forfeited. Leave may be restored and payment made to employee, now retired for disability because employee timely requested leave, and agency failure to schedule constituted administrative error within purview of 5 U. S. C. 6304(d)(1)(A) (Supp III, 1973). Cf. Matter of William D. Norsworthy, B-188284, March 7, 1978, 57 Comp. Gen. , and Matter of John Connor, B-189085, April 3, 1978.

This action is in response to a letter dated September 26, 1977, from Mrs. Donna D. Beecher, Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), requesting our decision as to whether HUD may restore 184 hours of annual leave forfeited by Mr. Gerard W. Caprio, a HUD employee, at the end of the 1976 leave year, in the circumstances stated.

As a general rule, we render formal decisions only to heads of departments and agencies, disbursing and certifying officers, and to claimants who have filed monetary claims with our Office. See 31 U. S. C. § 74 and 82d. However, in view of the fact that the problems involved in the instant situation are of a recurring nature, we are treating the request as if it had been submitted by the Secretary of Housing and Urban Development under the broad authority of 31 U. S. C. § 74. Cf. 55 Comp. Gen. 510 (1975).

It is stated that Mr. Caprio was employed as a supervisory appraiser in the HUD Newark Area Office until his disability retirement on April 6, 1977. By way of background, the submission states that Mr. Caprio became ill in September 1975 after suffering a cerebral infarction and was on sick leave until the end of the 1975 leave year. The record indicates that during this period his annual leave was scheduled for him by his employing office and not forfeited at the end of that leave year.

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Mr. Caprio returned to duty at the beginning of the 1976 leave year on a part-time basis. In this respect, it is stated that from January 4 through September 11, 1976, he was on sick leave for at least a part of each workday, other than three days on which he used annual leave and the one complete 8-hour day he worked. However, from September 12, 1976, through the end of the 1976 leave year, Mr. Caprio was on sick leave for 8 hours each workday.

In a letter dated October 23, 1976, Mr. Caprio informed his supervisor that he would know by January 10, 1977, whether there would be any improvement in his health problems (which included a vision problem), at which time he would either return to work or apply for disability retirement, and requested that his annual leave in excess of 240 hours be carried over into 1977. By letter dated November 5, 1976, Mr. Caprio's supervisor acknowledged receipt of the letter of October 23, 1976; advised Mr. Caprio that a request had been made of his physician for a further medical report; expressed concern and good wishes regarding his health; but did not respond to his request concerning annual leave. Thereafter, by letters dated November 20 and 26 1976, Mr. Caprio repeated his annual leave request. While no action was taken by his employing office in response to Mr. Caprio's initial letter of October 23, 1976, his branch chief informed him by letter dated November 19, 1976, that since he did not schedule any annual leave "before you became ill," he could not authorize carrying over the unused annual leave into 1977.

The matter was then referred to HUD's Regional Office in New York where Mr. Caprio's request was again denied, apparently on the basis that it had not been scheduled in advance. Thereupon he protested further to the Director of the Newark Area Office who again submitted the matter to the Regional Office. From there it was referred to HUD Headquarters in Washington, D.C. on February 4, 1977. Headquarters initially upheld the denial of Mr. Caprio's request by memorandum dated June 30, 1977. Subsequently, however, it was concluded by the Office of the Assistant Secretary for Administration (HUD) that there was merit to his argument that his request to his supervisors for permission to "carry over" his excess leave was tantamount to a request for leave. Consequently the case was submitted to this Office.

In submitting the matter, it is concluded by HUD that while Mr. Caprio's supervisors may have refused to schedule annual leave

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for him, it was the responsibility of his supervisors to schedule annual leave for him based on his prolonged illness and his request to carry over excess annual leave into the 1977 leave year to avoid possibility of forfeiture. We agree, for the reasons hereinafter stated.

The provisions of 5 U. S. C. § 6304(d)(1) (Supp. III, 1973) were added to title 5, United States Code, by subsection 3(2) of Public Law 93-181, approved December 14, 1973, 87 Stat. 705, which provides as follows:

"(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 Civil Service Commission has, pursuant to 5 U. S. C. § 6304(d)(2) (Supp. III, 1973) and 6311 (1970), issued regulations implementing the provisions of 5 U. S. C. § 6304 (d)(1) (Supp. III, 1973). As these regulations were issued under statutory authority they have the force and effect of law. The Civil Service Commission's regulations appear at title 5 of the Code of Federal Regulations, Part 630, Subpart C.

Section 630.308 of 5 C. F. R. , 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."

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With regard to this advance scheduling requirement paragraph 5(3)(c) of the Attachment to Federal Personnel Manual Letter 630-22 provides in pertinent part as follows:

"* * * The scheduling and, as necessary rescheduling of the annual leave must be in writing. (In this regard, Standard Form 71, Application for Leave, may be used to document the actions, supplemented as required.) Documentation must include the following:

" - The calendar date the leave was scheduled, i. e., approved by the official having authority to approve leave * * *" (Emphasis added.)

Since Mr. Caprio's request for annual leave was never approved in writing (either through inadvertance or error) by his supervisor, it may not be considered as scheduled in advance within the meaning of subsection 6304(d)(1)(C) and annual leave could not be restored under that subsection. In effect, Mr. Caprio's request remained in limbo until it was too late to be beneficially acted upon.

However, it should be pointed out that under Civil Service Commission Guidelines, employees always have had the option of using annual leave in place of sick leave when the absence is due to illness. Cf. 54 Comp. Gen. 1086 (1975). That being the case, Mr. Caprio's letter of October 23, 1976, should have been considered as a request for leave and the administrative office should have scheduled the leave, and the failure to do so, especially after his written request had been received by his supervisor, must be regarded as an administrative error within the purview of 5 U. S. C. § 6304(d)(1)(A).

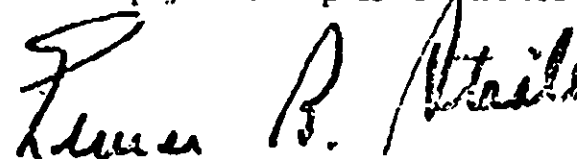
In line with the foregoing, we have held that failure on the part of the agency to properly schedule requested leave constitutes administrative error. Management can no more deny a leave request in derogation of the statutory right to restoration than it can fail to carry out written administrative regulations having mandatory effect for the purpose of counseling an employee in cases concerning retirement. See Matter of John J. Lynch, 55 Comp. Gen. 784 (1976).

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Since subsection 6304(d)(1)(A) authorizes restoration of leave lost because of administrative error when the error "causes" the loss, if an employee demonstrates that but for an administrative error in failing to schedule leave, he would be entitled to restoration of leave under subsection 6304(d)(1)(C), then such leave may be restored under subsection 6304(d)(1)(A). Compare the analogous situation presented in Matter of William D. Norsworthy, B-188284, March 7, 1978, 57 Comp. Gen. __.

In summation, the request in Mr. Caprio's letter of October 23, 1976, should have been acted upon by his superiors and, not doing so constituted administrative error. See Matter of John Connor, B-189085, April 3, 1978, citing Norsworthy, supra.

Accordingly, pursuant to title 5, United States Code, section 6304(d)(1)(A), HUD may restore and pay Mr. Caprio for the forfeited annual leave involved.



Comptroller General
of the United States