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**DECISION**



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

**FILE:** B-192494

**DATE:** July 30, 1979

**MATTER OF:** Norbert A. Shepanek [ Restoration of Forfeited Annual Leave. ]

**DIGEST:** Approved leave was forfeited due to exigency of public business. Central Intelligence Agency employee's request for restoration was denied by CIA because exigency determination was not made by proper official in advance of cancellation of leave. Employee timely requested leave in writing and agency's failure to present case to proper official for exigency determination was administrative error which caused the loss of leave. Employee is entitled to restoration of forfeited leave. 5 U.S.C. § 6304(d)(1)(A).

This decision concerns the question of whether forfeited annual leave may be restored under provisions of 5 U.S.C. § 6304(d)(1).

Mr. Norbert A. Shepanek, an employee of the Central Intelligence Agency (CIA), claims (restoration of previously scheduled annual leave that he forfeited due to exigencies of the public business.) Mr. Shepanek's claim was forwarded for decision by our Claims Division. In connection with this claim, the CIA, through its Assistant General Counsel, John A. Rizzo, has requested our guidance concerning the standards the CIA should follow in formulating internal administrative policies governing the restoration of forfeited annual leave.

In January of 1975 Mr. Shepanek was assigned to the Coordination Staff of the Office of the Inspector General which was created to process CIA material for the Presidential Commission on Intelligence, otherwise known as the Rockefeller Commission. Although the Coordination Staff was abolished in August 1975, Mr. Shepanek continued to act as a liason between the CIA and the Senate Select Committee on Intelligence, the House Select Committee on Intelligence, and the Department of Justice. On September 25, 1975, Mr. Shepanek submitted a Standard Form 71 requesting annual leave from October 20 to October 31, 1975. His supervisor approved this leave but later cancelled it due to the continuing House and Senate investigations. Subsequently, Mr. Shepanek submitted another Form 71 requesting annual leave from December 8, 1975, to January 2, 1976. His

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supervisor approved that request on November 6, 1975, but again found it necessary to cancel the leave. As a result Mr. Shepanek forfeited 104 hours of excess leave which could not be carried into the 1976 leave year.

On January 22, 1976, Mr. Shepanek made an application for restoration of his forfeited leave, supported by a statement from his supervisor that the leave had been cancelled due to a public exigency. On June 10, 1976, the Director of Finance approved the creation of a restored leave account. On January 7, 1977, however, the Director of Finance informed Mr. Shepanek that the June 1976 action was in error since the exigency determination had not been made in writing by the proper agency official in advance of the cancellation of leave.

For the reasons stated below, we hold that Mr. Shepanek is entitled to have the 104 hours of annual leave restored.

Forfeited annual leave can be restored under the limited circumstances set out in section 6304(d)(1) of title 5, United States Code (Supp. III, 1973), which provides:

"(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 (now Office of Personnel Management) regulations concerning restoration of leave are contained in Volume 5 of the Code of Federal Regulations. With regard to the officials authorized to make determinations of public exigency section 630.305 provides that:

"Before annual leave may be restored under section 6304 of title 5, United States Code, the determination that an exigency is of major importance and that therefore annual leave may not be used by employees to avoid forfeiture must be made by the head of the agency or someone designated by him to act for him on this matter. The designated official may not be more than two organizational levels below the head of the agency at the central headquarters levels, or more than one organizational level below the head of a major field headquarters or major field installation. Except where made by the head of the agency, the determination may not be made by any official in the immediate organizational unit affected by the exigency or by any official whose leave would be affected by the decision."

Although the properly designated official ratified in writing the exigency determination made by Mr. Shepanek's supervisor, the CIA felt this did not qualify the leave for restoration in light of paragraph 5a(2)(c) of the attachment to FPM letter 630-22, January 11, 1974, which provides under the heading "CSC Guidelines" that:

"The determination that the exigency is of such importance that employees cannot be excused from duty for the duration is a separate decision. Normally this decision is to be made in advance of the cancellation of scheduled leave, or the assignment of employees who will be affected by the work requirement generated by the exigency. Only a bona fide emergency would preclude making the decision in advance."

In several recent cases we have allowed restoration of leave where an employee submitted a Form 71 requesting leave but the supervisor refused to schedule it due to a public exigency. We stated that the failure to schedule the leave constituted an administrative error and leave could therefore be restored under 5 U.S.C. § 6304(d)(1)(A). See William D. Norsworthy, B-188284,

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March 7, 1978, (57 Comp. Gen. 325) and John Connor, B-189085, April 3, 1978. In an earlier case, Michael Dana, B-187104, April 1, 1977 (56 Comp. Gen. 470), we held that annual leave forfeited due to exigencies of the public business but not scheduled in advance by employees could not be restored under 5 U.S.C. § 6304(d)(1)(B) since the scheduling requirement was mandatory. We held that failure of the agency to inform the employees of the scheduling requirement did not constitute "administrative error" for purposes of 5 U.S.C. § 6304(d)(1)(A) stating that, "[e]ven if they have no actual knowledge, employees are charged with constructive knowledge of statutory requirements pertaining to them and of the implementing regulations authorized to be issued by statute."


The CIA feels that despite our holdings in Norsworthy and Connor, the quoted guideline requiring a determination of exigency prior to cancellation of leave, prevents restoration of Mr. Shepanek's leave. Furthermore, the CIA believes that in light of Dana Mr. Shepanek must be charged with constructive knowledge of the requirements of that regulation.

In our Norsworthy decision we affirmed the Dana decision, which held that, for restoration under subsection (B) or (C) of 5 U.S.C. § 6304(d)(1), the annual leave must have been scheduled in advance. However, we construed subsections (B) and (C) as creating a right to restoration of annual leave when it was lost because of a public exigency or sickness and was not lost due to the fault of the employee. Consequently, when an employee submits a "bona fide, formal and timely request for leave," there can be no discretion whether to schedule the leave or not. The agency must approve and schedule the leave either at the time requested by the employee or, if that is not possible because of the agency's workload, at some other time. In the case of an exigency of public business the matter must be submitted to the designated official for his determination. See Matter of Joseph Hanyok, B-187104, September 28, 1978. Since Mr. Shepanek submitted a formal and timely request for leave which was approved by his supervisor, the question of whether a public exigency existed should have been submitted to the proper official when his supervisor cancelled that leave. Therefore, because that question was not submitted, Mr. Shepanek is entitled to restoration of the forfeited leave under 5 U.S.C. § 6304(d)(1)(A). We do not feel that it is appropriate to charge an employee with constructive knowledge of a requirement which is the responsibility of an agency official to satisfy.

The CIA has also requested our guidance concerning the action it should take on a number of cases where it denied requests to restore leave from its employees on grounds substantially identical to the grounds upon which it denied Mr. Shepanek's request. The CIA is concerned about the proper disposition of these cases because the record in Norsworthy and Connor showed that the proper official would have determined an exigency existed had the matter been presented to him, while in the subject cases, the official who would have determined the existence of the exigency is in most instances no longer with the agency.

In Hanyok we held that if an agency is unable, due to a public exigency, to reschedule requested leave during the current leave year, the failure to submit the matter to the designated official for his determination of exigency constitutes an administrative error which would support a restoration of the requested leave pursuant to 5 U.S.C. § 6304(d)(1)(A). Therefore, it is not necessary for an employee, in order to have forfeited leave restored, to show that the proper official would have determined <sup>must</sup> ~~there was~~ a public exigency <sup>existed</sup>. If there <sup>was</sup> ~~is~~ no exigency, the agency has no discretion concerning whether or not to schedule the leave. Thus, even where there is no evidence in the record that the official would have made an exigency determination had the matter been presented to him, failure to submit the matter must be considered an administrative error.)

If any of the (employees) concerned requests that the CIA restore their leave, however, they (must show that they submitted a formal and timely request for leave in order to satisfy the congressional intention that § 6304(d)(1) would authorize restoration of leave lost through no fault of the employee,) but would not authorize restoration of leave lost because the employee of his own volition chose not to use it. See Norsworthy, and Hanyok, supra.

  
Deputy Comptroller General  
of the United States