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DECISION

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

PLM-I

FILE: B-192502 DATE: December 26, 1978

MATTER OF: Copp Collins - Annual and Sick Leave

[Expert Appointed on Intermittent Basis Is Not Entitled to Leave Since He Was Not Required to Work a Standard Workweek]

DIGEST: Expert appointed on an intermittent basis is not entitled to leave even though he was compensated for 80 hours per pay period for substantially the full term of his employment. His work was assigned on a project basis and the hours at which he worked were largely within his discretion. Since he was not required in advance to report at a definite and certain time within each workweek, he is not entitled to leave as a part-time employee with an established regular tour of duty. He is not entitled to leave as a de facto full-time employee since he was not required to work a standard workweek.

This matter involves Mr. Copp Collins' claim for crediting of annual and sick leave for the period from June 30, 1977, to May 26, 1978, during which he served under an excepted appointment as an expert with the Energy and Minerals Division of the General Accounting Office.

Mr. Collins was appointed as an expert under the authority of 5 U.S.C. § 3109 (1976), as implemented by 31 U.S.C. § 52c (1976), and Pub. L. No. 94-440, 90 Stat. 1439. His appointment, effective June 30, 1977, was designated as "Excepted Appointment - Intermittent," and was limited to a period not to exceed 130 working days in a service year. The following notation was included on the Standard Form 50 effecting his appointment:

> "Ineligible for Health Benefits, Annual or Sick Leave or any other Benefits provided by law for Government employees except as specifically provided."

Effective January 9, 1978, his appointment as an expert was converted to an excepted appointment not to exceed June 29, 1978.

Notwithstanding the above notation, Mr. Collins claims entitlement to both annual and sick leave on the basis that he:

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> "* * * was a de facto fulltime employee during the entire period from June 30, 1977 to April 22, 1978, and a part-time, temporary Expert employee from April 23, 1978 to May 26, 1978, but with ample extra time built up that [he] could receive administrative or 'comp' time to make that latter period fulltime * * *."

In support of the contention that he is entitled to leave credits, Mr. Collins has prepared and submitted time sheets showing that, with the exception of the last three pay periods, he worked 80 hours per pay period throughout the term of his employment. In addition to the 80 hours per pay period for which he was compensated, Mr. Collins' time sheets show that he worked an additional 235.5 hours in the evenings, overnight, and on weekends and holidays.

An expert or consultant whose services are secured on an employment rather than an independent contract basis under the authority of 5 U.S.C. § 3109 is entitled to annual and sick leave insofar as he is eligible under the applicable provisions of chapter 63, subchapter I, title 5, of the United States Code (1976). The mere fact that an expert may have been compensated for an aggregate of 80 hours per pay period does not itself establish his entitlement to leave benefits. Under 5 U.S.C. § 6301 (1976) the annual and sick leave provisions apply generally to employees as defined in 5 U.S.C. § 2105 (1976) and to individuals employed by the government of the District of Columbia, except those categories of employees specifically excluded from coverage by subsections 6301(2)(i)-(xii). Subsection 6301(2)(ii) specifically excludes from entitlement to annual and sick leave:

> "(ii) a part-time employee who does not have an established regular tour of duty during the administrative workweek * * *."

As used in this context the term "part-time employee" includes employees hired on an intermittent or when-actually-employed basis. Matter of John W. Matrau, et al., B-191915, September 29, 1978; 32 Comp. Gen. 206) (1952). It extends to experts and consultants serving on an intermittent basis. 35 Comp. Gen. 638 (1956).

With regard to Mr. Collins' assertion that he is entitled to leave benefits by virtue of having worked 80 hours per pay period, we have specifically held that part-time employees, including those appointed on an intermittent or when-actually-employed basis, are not entitled to leave benefits even though they might actually work full-time, unless their work is pursuant to a regular tour of duty prescribed in advance. 31 Comp. Gen. 215 (1951). In fact, the contention that a person who works the annual equivalent of a 40-hour workweek is not a part-time employee but is entitled to leave benefits regardless of whether he has a regular tour of duty was specifically found to be without merit by the Court of Claims in Lemily, et al. v. United States, 190 Ct. Cl. No. 57 (1969). There the court stated:

> "Plaintiffs' contention that a person who works the annual equivalent of a 40-hour week is, by definition, not a part-time employee under the Act, is without merit.
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> "The standard personnel forms (S.F. 50) by which plaintiffs were employed neither guaranteed nor required any particular amount of work. Finding 23, infra. Suffice to say, the forms expressly noted that plaintiffs were only to be paid 'when-actually-employed.'
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> "The legislative history of the 1951 Act, previously discussed, makes it abundantly clear that the government employee for whom Congress fashioned the generally applicable leave benefits was one who was required to regularly put in the standard 40-hour workweek. A 'basic workweek' is so defined in the Civil Service Regulations. 5 C.F.R. § 25.211 (Rev. as of Jan. 1961). Thus, the annual and sick leave allowances provided in the 1951 Act are stated in terms of days, or fractions thereof, 'for each full bi-weekly pay period.' The regular 40-hour workweek is implicit in that arrangement.
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> "In general, the full-time employee to whom the provisions of the 1951 Act are applicable is one regularly required to put in the standard workweek,

not a when-actually-employed employee who happens to work the annual equivalent of a 40-hour week."

Under the above decisions, notwithstanding that Mr. Collins was compensated for 80 hours per pay period, he is entitled to crediting of annual and sick leave only insofar as he had an established regular tour of duty during the administrative workweek. In this connection we have specifically recognized that the mere designation of an employee's appointment as "intermittent" is not conclusive of the question of his entitlement to annual and sick leave if his actual service differs and is not in fact intermittent but is performed pursuant to a regularly scheduled tour of duty. Matter of Julia McCarthy and others, B-183813, June 20, 1975, and Matter of Kenneth L. Nash, 57 Comp. Gen. 82 (1977).

In 31 Comp. Gen. 581 (1952) we construed the requirement that the employee have an established tour of duty as contemplating a "definite and certain time, day and/or hour of any day, during the workweek when the employee regularly will be required to perform duty." In 32 Comp. Gen. 490 (1953) we amplified that definition, holding that a part-time employee is entitled to benefits under the leave act only if he serves under an established tour of duty for each of the two administrative workweeks in each biweekly pay period. The holdings in these two decisions are reflected in the Civil Service Commission's instructions at Book 630, subchapter S2-3a(4) of Federal Personnel Manual Supplement 990-2. Consistent with those decisions we held in Kenneth L. Nash, supra, that an Immigration and Naturalization Service inspector whose position was designated "intermittent" was nonetheless entitled to annual leave benefits as a part-time employee having an established regular tour of duty where he was routinely issued a form scheduling his work at specific times and dates for each of the two workweeks of the next pay period. Compare John W. Matrau, et al., supra, denying leave benefits to intermittent employees who were given tentative schedules on a weekly basis as a matter of personal convenience.

Mr. Collins does not specifically claim that he had an established regular tour of duty while serving as an expert with the Energy and Minerals Division. Rather, the time sheets that he prepared suggest that his working hours in large part were determined by the demands of the particular tasks on which he was

working and were within his discretion. The time sheets show that Mr. Collins worked 8 hours a day during regular duty hours from Monday through Friday of both administrative workweeks of the pay period for only 7 of the 24 pay periods of his appointment. During all 24 pay periods he worked various hours outside regular duty hours.

Mr. Collins worked on two separate projects while employed with the Energy and Minerals Division. One dealt with coal and the other with biomass and solid waste. In connection with his work on the coal research project, Mr. Collins was given his assignment on a job basis. The schedule by which he performed that assignment was a matter within his own judgment and, except for occasional instances in which he was specifically asked to be present at the office, he was not required by his supervisors to report for work at any particular time. While Mr. Collins was assigned to work in the area of biomass and solid waste during the latter part of his appointment, he was not required to work in accordance with any particular schedule. Essentially, it was Mr. Collins, not the Energy and Minerals Division, who determined when and how long he would work. Officials of the Energy and Minerals Division were aware that Mr. Collins was reporting to work on substantially a full-time basis for an extended period. However, while that awareness may raise some question as to the propriety of designating his initial appointment as "intermittent," mere awareness of even strictly routine work performance does not establish that an employee had a prescribed regular tour of duty where, in fact, he was not required by his agency to perform duty at any particular times.

Since Mr. Collins was not scheduled by the Energy and Minerals Division to work at a definite and certain time, day and/or hour of any day, during each of the two administrative workweeks in each biweekly pay period, he is not entitled to leave benefits as a part-time employee having an established regular tour of duty. And, consistent with the above-quoted language from Lemily, supra, since Mr. Collins was not regularly required to put in a standard workweek, we find no merit to Mr. Collins' contention that he is entitled to leave benefits as a "de facto fulltime employee."

Accordingly, Mr. Collins' claim for accrued leave is disallowed.

Acting Comptroller General
of the United States