

DECISION



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

10,107

FILE: B-194187

Request for

DATE: May 9, 1979

MATTER OF: Walter E. Blank - Restoration of Annual Leave

DIGEST: NASA employee elected to be carried on continuation-of-pay status for 45-day period after job-related injury pursuant to Pub. L. No. 93-416. Contrary to 20 C.F.R. § 10,200 et seq., NASA refused to continue his pay but required him to take leave to cover the periods of his absence attributable to the injury. Upon correction of his leave accounts, annual leave subject to forfeiture may be restored under 5 U.S.C. § 6304(d)(1)(A) (1976) as leave lost because of administrative error.

Patrick F. O'Brien, an authorized certifying officer of the National Aeronautics and Space Administration (NASA), Washington, D. C., seeks an advance decision as to whether 34 hours of annual leave may be restored to Walter E. Blank, a NASA Headquarters employee, under Pub. L. No. 93-181, 87 Stat. 705 (1973), 5 U.S.C. § 6304(d)(1)(A) (1976).

The certifying officer asks:

"(a) Upon the determination of administrative error by a responsible authority, may forfeited annual leave be restored by operation of 5 U.S.C. 6304(d)(2) if there is also a finding of fault on the part of the employee.

"(b) May a finding of fault be made in a case where the employee acknowledged the annual leave taken by initialing his Time and Attendance Record and where he has been regularly advised through the issuance of biweekly Earning and Leave Statements * * * which reflects the amount and type of leave charged to his account during each pay period."

The record shows that Mr. Blank was injured on the job February 2, 1977. He applied for workmen's compensation and his claim, controverted by NASA, was forwarded to the Office of Workmen's Compensation Programs (OWCP), Department of Labor, on April 7, 1977, under the provisions of the Federal Employees' Compensation Act, 5 U.S.C. § 8101 et seq. (1976).

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In April 1978, NASA received a notice from the OWCP that the claim was noncontroverted and that Mr. Blank was entitled to continuation of pay for the period of his disability not to exceed 45 days.

At the time of his injury, Mr. Blank requested that his absence from work attributable to the injury be charged to continuation of pay under 5 U.S.C. § 8118 (1976). Apparently because NASA controverted his claim that the injury was a "job-related, traumatic injury" it denied his request for continuation of pay. His absence from work as a result of the injury was instead charged to 72 hours of sick leave and 34 hours of annual leave. In compliance with the determination by the OWCP that he was entitled to continuation of pay, NASA restored 72 hours of sick leave and 34 hours of annual leave to Mr. Blank's respective leave accounts. However, because of the operation of 5 U.S.C. § 6304(a) (1976), the 34 hours of restored annual leave was forfeited, since Mr. Blank carried forward the maximum allowable 240 hours to the 1978 leave year.

A determination of administrative error has been made by NASA based on its view that the entire period of Mr. Blank's absence attributable to his work-related injury should have been charged to sick leave rather than to annual leave. Because Mr. Blank signed for the annual leave and understood that he had taken the 34 hours of annual leave, the certifying officer questions that determination of administrative error.

What constitutes administrative error under 5 U.S.C. § 6304(d)(1)(A) is a matter within the primary jurisdiction of the agency involved. See Matter of John J. Lynch, 55 Comp. Gen. 784 (1976). However, decisions of this Office have construed an administrative error as the failure of an agency to follow written administrative regulations having mandatory effect. In general an employee entitled to use sick leave who specifically requests to have his absence charged to annual leave may not, in the leave year after the annual leave is granted, have such leave charged instead to his sick leave account. 54 Comp. Gen. 1086 (1976) and B-191076, June 12, 1978. However, we do not view Mr. Blank's case as one in which his absence was simply charged to his annual leave rather than his sick leave account, but as a case in which NASA, contrary to a mandatory regulation, refused to carry him in a continued-pay status under 5 U.S.C. § 8118, resulting in improper charges to either leave account.

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The Federal Employees' Compensation Act as amended in part by Pub. L. No. 93-416, 88 Stat. 1145 (1974), 5 U.S.C. § 8118 (1976), provides in pertinent part that:

"(a) The United States shall authorize the continuation of pay of an employee * * * who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in sections 8122(a)(2) of this title.

"(b) Continuation of pay under this subchapter shall be furnished--

* * * * *

"(2) for a period not to exceed 45 days; and

"(c) An employee may use annual or sick leave to his credit at the time the disability begins * * *."

The Secretary of Labor has promulgated regulations on continuation of pay pursuant to this statute in 20 C.F.R. § 10.200 et seq. (1976). The employing agency can controvert an employee's claim and terminate his pay right under any one of the nine circumstances listed at 20 C.F.R. § 10.202(a) (1976). In all other cases in which the employing agency controverts an employee's right to continuation of pay, 20 C.F.R. § 10.202(b) (1976) specifically provides that the employee's regular pay cannot be interrupted during the 45-day period unless the controversion is sustained by the OWCP and until the employing agency is notified. 20 C.F.R. § 10.202(b) (1976). In this case the OWCP advised NASA that Mr. Blank's claim was noncontroverted and that he should be carried on continuation of pay for a period not to exceed 45 days.

Although 20 C.F.R. § 10.210 (1976) provides that an employee can make an election to have his absence charged to annual or sick leave, the record shows that Mr. Blank did not so elect but, on his original claim form CA-1, chose to have his lost time charged to continuation of pay in accordance with OWCP regulations at 20 C.F.R. § 10.209(a) (1976). In view of his election, and under the regulations discussed above, Mr. Blank was entitled to be carried in a continuation-of-pay status for a 45-day period.

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Subsection 6304(d)(1)(A) of title 5 of the United States Code authorizes restoration of lost leave because of an administrative error when the error "causes" the loss. In this case NASA's failure to carry Mr. Blank in a continuation-of-pay status contrary to a mandatory regulation constituted an administrative error that directly caused the loss of his leave. See Matter of Gerard W. Caprio, B-190263, July 5, 1978. Since his absence should not have been charged to either leave account, we do not view Mr. Blank's determination to have a portion of his absence charged to annual leave rather than sick leave as precluding restoration of the 34 hours of annual leave under 5 U.S.C. § 6304(d)(1)(A).

Accordingly, pursuant to 5 U.S.C. § 6304(d)(1)(A) (1976), NASA may restore the 34 hours of forfeited annual leave to Mr. Blank's annual leave account. This decision, based on the mandatory effect of the Department of Labor's regulations on continuation of pay, is to be distinguished from cases, including Matter of Helen Wakus, B-184008, March 7, 1977, and Matter of Betty J. Anderson, B-182608, August 9, 1977, involving annual leave that is properly taken but that is "bought back" under the Federal Employees' Compensation Act.


Deputy Comptroller General
of the United States