The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Russell C. Washington, Sr., et al.

File: B-229170

Date: September 9, 1988

DIGEST

Employees were appointed on a when-actually-employed or intermittent basis. While they generally worked the same schedule over a period of time, this alone does not constitute a regularly scheduled tour of duty. Therefore, the employees are not entitled to retroactive annual and sick leave benefits.

DECISION

We hold that Russel C. Washington, Sr., et al., employees of the Bureau of the Census, United States Department of Commerce, are not entitled to retroactive annual and sick leave benefits for the time during which they were employed in an intermittent or when-actually-employed (WAE) status.

BACKGROUND

This action results from simultaneous submissions for a decision by the Comptroller General on an unresolved grievance between employees represented by the American Federation of Government Employees, Local 2782, AFL-CIO, and the Bureau of the Census, United States Department of Commerce. The two issues in dispute which gave rise to the grievance are: (1) whether Russel C. Washington, Sr., and 10 other employees, intermittent (WAE) employees of the Bureau of the Census, were required to work prescheduled tours of duty; and, (2) if so, whether they are entitled to retroactive annual and sick leave benefits on a pro rata basis for the weeks they in fact worked prescheduled tours of duty.

All 11 employees were designated intermittents, or WAEs, and did not accrue annual or sick leave until offered the opportunity in 1985 to change to mixed tour, permanent full-time, or permanent part-time status, in which they did

accrue leave. All worked at least 20 hours per week during their intermittent employment, and two worked 40 hours per week, excluding holidays and illness. Most claim that the change of employment status had little or no effect on the terms of their employment except that they now accrue leave and other benefits.

Of the employees that so specified in the record, all stated that they were asked at the start of each job what hours they wished to work, and their schedules were set accordingly. In only two cases did an employee report that supervisors asked them to work more, and that was a request for an added number of hours, to be worked at the employee's convenience, not on a schedule set out by the supervisor. In several cases, employees' schedules were changed for their convenience, for example, when a child's school schedule changed, the parent's work schedule changed.

We are urged to conclude that these employees, although designated WAEs, actually worked prescheduled tours of duty and were required to be at work in accordance with these schedules. As a result they should have accrued annual and sick leave.

The Bureau contends that when employees were accepted into the Intermittent-WAE program they were informed that they would have no fixed tour of duty and would not be obligated to come to work and that they would not accrue annual and sick leave. The Bureau also contends that although employees in the program were asked to approximate the amount of time they would be available for work, they were not required to work set schedules.

DISCUSSION AND CONCLUSION

Intermittent or WAE employment status is defined in 5 C.F.R. § 340.401 (1985) as "employment without a regularly scheduled tour of duty." Intermittents are hired to supplement the regular work force during periods of higher than normal workload.

Under 5 U.S.C. § 6301(2)(B)(ii), an employee must work a "regular tour of duty during the administrative workweek" in order to qualify for leave benefits. In 31 Comp. Gen. 581 (1952), we construed a 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." This decision was applied in John W. Mattrau, et al., B-191915, Sept. 29, 1978,

which held that "intermittent employees are not eligible for annual and sick leave benefits."

In 31 Comp. Gen. 215 (1951), we specifically held that part-time employees, including intermittents and WAEs, are not entitled to leave benefits unless their work is performed pursuant to a regular tour of duty prescribed in advance. We have previously ruled that the mere designation of an employee's status as intermittent is not conclusive of whether he or she is entitled to annual or sick leave if his or her actual service is not in fact intermittent but is required to be performed pursuant to a regularly scheduled tour of duty set in advance. See Julia McCarthy and Others, B-183813, June 20, 1975, and Kenneth L. Nash, 57 Comp. Gen. 82 (1977).

The employees in this case have raised the Nash decision as the basis for their leave entitlement. Mr. Nash, an intermittent employee of the Immigration and Naturalization Service (INS), was granted retroactive leave benefits during his employment for the time in which his assignments were prescheduled on a biweekly basis. Nash can be distinguished from the case in question in two respects. The first is that the INS "determined that Mr. Nash in fact worked a regular tour of duty established in advance." Nash, 57 Comp. Gen. at 83. Secondly, Mr. Nash was given a schedule biweekly by his supervisor, which told him exactly the times he was required to work. Nash, 57 Comp. Gen. at 85. In the case at hand, the employees worked a schedule of their own choosing, and were able to change it at will. An occasional request by a supervisor to work a few more hours at the employee's discretion does not constitute a regular tour of duty scheduled in advance.

The fact that the employees had each established a somewhat regular pattern of work and in fact actually worked 40 hours a week does not necessarily entitle them to be considered part- or full-time employees. In Capp Collins, 58 Comp. Gen. 167 (1968), we held that an expert hired as an intermittent was not entitled to leave benefits simply because he regularly worked 80 hours per pay period throughout his employment. This holding is extended to those employees who regularly worked a schedule of their own choosing of less than 80 hours per pay period. Merely establishing a work pattern does not entitle the employees to retroactive leave benefits. See Lemily, et al. v. United States, 418 F.2d 1337 (Ct. Cl., 1969).

In this case, the record does not show that the employees involved were required to work a regular tour of duty scheduled in advance, even though some of them actually

worked 40 hours a week. Accordingly, it is our view that these employees are not entitled to retroactive leave benefits.

Milton J. Socolar

for Comptroller General
of the United States