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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20549

**FILE:** B-189085

**DATE:** April 3, 1978

**MATTER OF:** John Connor - Restoration of Forfeited  
Annual Leave

**DIGEST:** Employee of Securities and Exchange Commission requested annual leave and timely submitted SF 71, Application for Leave, to supervisor who denied request due to exigency of public business. Supervisor did not schedule leave and as result agency determined employee was not entitled to leave restoration under 5 U.S.C. 6304(d)(1)(B). Leave may be restored under 5 U.S.C. 6304(d)(1)(A) as agency failure to properly schedule leave, which prevented restoration of leave due to exigency of public service, constitutes administrative error. See B-188284, March 7, 1978.

This matter concerns the request of Mr. Lawrence H. Haynes, an authorized certifying officer of the Securities and Exchange Commission (Commission), requesting a decision as to whether annual leave forfeited by Mr. John Connor, an investigator with the Commission, at the end of the 1976 leave period may be restored under the provisions of 5 U.S.C. 6304(d)(1) (Supp. III, 1973).

The record shows that in the summer and early fall of 1976 Mr. Connor informally informed his supervisor, the Assistant Director, Division of Enforcement, that he would be taking annual leave in December and that his supervisor orally indicated that he would approve the use of annual leave. Apparently for some 10 years Mr. Connor has taken substantial amounts of leave during December.

On November 20, 1976, Mr. Connor submitted to his supervisor a Standard Form 71 (SF 71), Application for Leave, in which he requested the use of 128 hours of annual leave for the period December 8 to December 30, 1976. The requested annual leave was

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subject to forfeiture under 5 U.S.C. 6304. Mr. Connor's supervisor informally disapproved the request for the use of annual leave when he received the SF 71, and on November 29, 1976, he did so in writing. The denial of Mr. Connor's request for leave approval was based on his supervisor's belief that Mr. Connor's participation in several important agency investigations would require him to remain on the job through the end of December. Thus, as of November 29, 1977, Mr. Connor's use of annual leave during the 1976 leave year which had been requested timely had not been approved.

On December 22, 1977, circumstances permitted Mr. Connor to go on annual leave status and he used 40 hours of the 130 hours of annual leave which were subject to forfeiture.

Mr. Connor subsequently requested that pursuant to Public Law 93-181, approved December 14, 1973, the 90 hours of leave which he had forfeited be restored. On February 16, 1977, the Director of Personnel and the Assistant Comptroller of the Commission denied Mr. Connor's request for leave restoration. The basis of the denial was that Mr. Connor's annual leave was not scheduled a minimum of 3 biweekly pay periods before the end of the leave year.

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."

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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. 304(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 bi-weekly pay period prior to the end of the leave year."

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. Connor's annual leave was never approved in writing by his supervisor, it was not scheduled in advance within the meaning of subsection 6304(d)(1)(B) and therefore annual leave may not be restored under that subsection.

The agency also asks whether the failure of Mr. Connor's supervisor to schedule his leave within the time frame specified

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in 5 C.F.R. 631.308 constitutes administrative error so as to entitle Mr. Connor to leave restoration pursuant to 5 U.S.C. 6304(d)(1)(A).

When an employee submits a formal and timely request for leave the agency must approve the leave either at the time requested by the employee, or if that is not possible because of the agency's work load, at some other time, and failure to so schedule the requested leave constitutes administrative error. In the case of an exigency the matter must be submitted to the designated official for his determination. Matter of William U. Norsworthy, B-188284, March 7, 1978. Accordingly, where an employee demonstrates that, but for an administrative error in failing to schedule requested leave or to present the case to the proper official for a determination of a public exigency, he would be entitled to restoration of leave under subsection 6304(d)(1)(B), then such leave may be restored under subsection 6304(d)(1)(A). See Norsworthy, supra.

In Mr. Connor's case the record shows that he submitted his SF 71, Application for Leave, on November 20, 1976, before the start of the third biweekly pay period prior to the end of the leave year, in which he requested the use of 128 of the 130 hours of leave subject to forfeiture. Due to an exigency of the public business, this request for leave was disapproved by Mr. Connor's supervisor who did not schedule the leave or present the matter to the official designated to determine a public exigency. Accordingly, the agency may restore, under subsection 6304(d)(1)(A), 88 hours of the 90 hours of leave which Mr. Connor was unable to use prior to the expiration of the 1976 leave year if the proper agency official determines that he could not take such leave because an exigency of the public business existed.

Deputy

  
Comptroller General  
of the United States