The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Paul A. Carr and Jerald P. Seach - Restoration of Forfeited Annual Leave

File: B-222221

Date: September 8, 1986

DIGEST

An agency erroneously advised two employees who had qualified for early retirement benefits that they were subject to mandatory age retirement. In anticipation of their separation, the employees applied for voluntary retirement at the end of the 1985 leave year and did not schedule or use annual leave exceeding their personal leave ceilings. By the time the agency discovered its error and the employees withdrew their retirement applications, they had insufficient time to schedule and use much of their excess annual leave and they forfeited that leave. We hold that the forfeited annual leave may be restored to the employees under 5 U.S.C. § 6304(d)(1)(A), because the record shows that the forfeiture resulted from an administrative error.

DECISION

Mr. M. Arnold Werner, Assistant Director (Personnel and Security) of the Defense Investigative Service (DIS), requests our decision as to whether annual leave forfeited by Messrs. Paul A. Carr and Jerald P. Seach at the end of the 1985 leave year may be restored to their accounts. As explained below, we hold that the forfeited leave may be restored under 5 U.S.C. § 6304(d)(1)(A) because the record indicates that the forfeiture resulted from an administrative error.

BACKGROUND

According to DIS's request and the various judicial and administrative opinions having a bearing on this matter, the relevant facts are as follows. Messrs. Carr and Seach were employed by the Naval Investigative Service (NIS) as criminal investigators qualifying for the special retirement coverage

afforded "law enforcement officers" by 5 U.S.C. §§ 8335(b), 8336(c), and 8339(d). Briefly, section 8335(b) requires the mandatory retirement of law enforcement officers at age 55, section 8336(c) affords such officers the option of early retirement at age 50, after 20 years' service, and section 8339(d) provides in either event for the payment of an annuity at a rate higher than that authorized for most other civilian employees.

In November 1972, Messrs. Carr and Seach and all other NIS investigators were transferred with their functions to DIS. Although the transferred employees retained the title, grade, and pay they enjoyed at NIS, the then Civil Service Commission (CSC) (now Office of Personnel Management) evaluated their duties at DIS and decided in 1974 that they no longer qualified as "law enforcement officers" for purposes of the special retirement coverage.

A number of the transferred investigators (but apparently not Messrs. Carr and Seach) appealed CSC's determination to the District Court for the District of Columbia. In its decision Boggs v. Regan, No. 79-1090 (D.D.C. June 30, 1981), the district court did not dispute CSC's determination that the DIS investigators no longer qualified as "law enforcement officers" for retirement purposes. Nevertheless, the district court held that the government was equitably estopped from denying the plaintiffs early retirement benefits under 5 U.S.C. § 8336(c), at the rate provided by section 8339(d), because it had not given the employees any indication that they would lose benefits by transferring from NIS to DIS.

Following issuance of the Boggs decision, DIS asked the Office of Personnel Management (OPM) for an advisory opinion explaining the application of Boggs to Messrs. Carr and Seach and other transferred investigators who had not been parties to the suit. The OPM advised DIS that it had decided to apply Boggs to all of the transferred investigators, whether or not they had been involved in the suit. Thus, OPM stated that all of the investigators would be eligible for early retirement under 5 U.S.C. § 8336(c), and that their service at DIS would be credited toward the 20 years required for retirement under that statute.

The DIS sent the investigators written notices apprising them of their retirement rights under the Boggs decision and OPM's advisory opinion. In these notices, DIS added its own interpretation of Boggs by stating that the investigators would be subject to mandatory retirement at age 55 by virtue of 5 U.S.C. § 8335(b). Thus, by memorandum dated September 20, 1983, Mr. Carr was notified that:

> "Since you will have 20 years of creditable service on October 21, 1983, and have reached age 50, you will be eligible for voluntary retirement on October 21, 1983, the date you complete 20 years of creditable service. Your mandatory retirement date * * * has been set at no later than July 31, 1987, the last day of the month in which you * * * [reach age 55]."

Similarly, by memorandum dated January 28, 1983, Mr. Seach was advised that he would be mandatorily retired effective February 28, 1986.

One investigator who DIS had separated through mandatory retirement in 1983 challenged his separation before the Merit Systems Protection Board (MSPB). The MSPB upheld the employee's separation in Ryan v. Defense Investigative Service, 25 M.S.P.R. 551 (1985), finding that DIS had properly determined that the transferred investigators were subject to mandatory retirement. The investigator involved in Ryan appealed the MSPB's decision to the Court of Appeals for the Federal Circuit.

While the Ryan appeal was pending, in October and November 1985, respectively, Messrs. Carr and Seach applied for early retirement under 5 U.S.C. § 8336(c), effective January 3, 1986. According to DIS, the employees explained that their decision to voluntarily retire was based on their upcoming mandatory retirement. Also, according to DIS, neither employee had used or scheduled annual leave exceeding his maximum carryover for the 1985 leave year because each employee was anticipating a lump-sum payment for his unused, accrued annual leave upon retirement. Thus, at the time they filed their retirement applications, Messrs. Carr and

Seach had annual leave balances exceeding their personal leave ceilings of 351 and 330 hours, respectively. 1/

On December 12, 1985, the Court of Appeals for the Federal Circuit reversed the MSPB's decision in Ryan, above, holding that, although the investigators were eligible for early retirement benefits by virtue of the district court's decision in Boggs, they were not subject to mandatory retirement. Ryan v. Merit Systems Protection Board, No. 85-2069 (Fed. Cir. Dec. 12, 1985). The DIS notified Messrs. Carr and Seach of the Ryan decision on December 17, 1985, 2 weeks before their scheduled retirement, and both employees elected to withdraw their retirement applications.

Between December 17, 1985, and January 4, 1986, the end of the 1985 leave year, Mr. Carr used 40 hours of annual leave and Mr. Seach used 32 hours. Mr. Carr ended the leave year with 463 hours of annual leave, 112 hours above his maximum carryover of 351 hours, and, therefore, he forfeited the 112 hours. Similarly, Mr. Seach forfeited the 120 hours by which his annual leave balance of 450 hours exceeded his maximum carryover of 330 hours.

Against this background, DIS questions whether the annual leave forfeited by Messrs. Carr and Seach may be restored to their accounts under 5 U.S.C. § 6304(d)(1), discussed below.

DISCUSSION

The provisions of 5 U.S.C. § 6304(d)(1) allow the restoration of forfeited annual leave if the forfeiture resulted from one

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1/ The employees had personal leave ceilings exceeding the 240 hours normally allowed federal employees under 5 U.S.C. § 6304(a) because, at one time, they had been stationed overseas. See 5 U.S.C. § 6304(b) (authorizing an annual leave ceiling of 360 hours for employees stationed overseas); and 5 U.S.C. § 6304(c) (allowing an employee who returns to the United States following overseas duty to retain the amount of annual leave he had accumulated under section 6304(b) as his personal leave ceiling, subject to reduction if he uses more annual leave in a leave year than he earns.

of three circumstances specified in the statute. These circumstances, as stated in section 6304(d)(1), are as follows:

> "(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;
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> "(B) exigencies of the public business when the annual leave was scheduled in advance; or
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> "(C) sickness of the employee when the annual leave was scheduled in advance; * * *."

In this case, the only applicable basis for the restoration of leave is the "administrative error" criterion stated in subsection (A). While we have not precisely defined the term "administrative error," recognizing that the employing agency is usually in the best position to decide whether it has committed such an error, we have described several situations which we would view as supporting a determination of administrative error under subsection (A). See John J. Lynch, 55 Comp. Gen. 784 (1976). For example, in view of an agency's responsibility for maintaining accurate retirement records and counseling employees concerning their retirement rights and obligations, we have stated that an agency's failure to provide an employee with correct advice concerning his eligibility for retirement would constitute an administrative error for purposes of section 6304(d)(1)(A). See Lynch, above, at 785, citing B-174199, December 14, 1971.

Reviewing the record before us, we believe that DIS committed an administrative error when, based on its misinterpretation of the district court's decision in Boggs, it advised Messrs. Carr and Seach that they would be subject to mandatory retirement. This incorrect advice induced the employees to apply for early retirement in January 1986, and, in anticipation of that retirement, to accrue annual leave in excess of their maximum carryover for the 1985 leave year. The agency did not discover its error until mid-December 1985, when the court of appeals issued its decision in Ryan, leaving the employees only 2 weeks to schedule and use their excess annual leave. Thus, as a result of DIS's error, Mr. Carr forfeited 112 hours of annual leave and Mr. Seach forfeited 120 hours.

Since we view the facts of this case as supporting a determination of administrative error under 5 U.S.C. § 6304(d)(1)(A), we hold that the annual leave which Messrs. Carr and Seach forfeited as a result of that error may be restored to their accounts.

for Shelton J. Horstar
Comptroller General
of the United States