

DECISION

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THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548
50547

FILE: B-176168**DATE:** FEB 13 1975**MATTER OF:** Mitchell J. Sabagh - Restoration of forfeited annual leave under Public Law 93-181

DIGEST: Employee who received lump-sum leave payment upon separation was reemployed prior to expiration of period covered by leave. Agency withheld recredit of such leave until installment payments covering excess lump-sum payment was completed and employee forfeited 89 hours of leave when his leave record was reconstructed as of date of reemployment. Agency's determination not to restore leave is affirmed since it was held in B-176168, September 1, 1972, that leave was primarily forfeited through employee's delay in refunding excess lump-sum leave payment and there is no additional evidence to show administrative error warranting recrediting under provisions of Public Law 93-181.

This action is in response to the request of Mr. Mitchell J. Sabagh, an employee of the Department of the Interior (Department), for restoration under the provisions of 5 U.S.C. §6304(d)(1)(A), as added by Public Law 93-181, approved December 14, 1973, 87 Stat. 705, of 89 hours of annual leave which is alleged to have been forfeited through administrative error. His request was submitted to our Office after a hearing on this matter was denied by the Department's Office of Organization and Personnel Management on the ground that no useful purpose would be served by such hearing since the Comptroller General had ruled in decision B-176168, September 1, 1972, that no administrative error had occurred in this case and the new law did not define administrative error or otherwise serve to change decisions made on the question of whether administrative error had occurred in specific cases.

In his request to our Office Mr. Sabagh states that the Department's Division of Fiscal Services was not aware of the provisions of the Federal Personnel Manual (FPM), chapter 630, subchapter 5, and the holding in 38 Comp. Gen. 91 (1958), which he understands require "that the recredit of annual leave should be reconstructed as of the date of the reemployment" and that denial of the use of the leave covered by his refund is confiscatory of a valuable property right. He, therefore, requests that this leave be recredited and that he be allowed to use it within 2 years

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as provided in Civil Service Commission Regulation 630.306 (Attachment to FPM Letter No. 630-22, January 11, 1974), implementing the provisions of Public Law 93-181, with regard to the restoration of leave as therein provided.

The facts in this case were set forth in our decision of September 1, 1972, supra, and are therefore not repeated in detail. Mr. Sabagh was reemployed on May 6, 1970, after his separation from another agency where he had been paid a lump sum for leave through May 21, 1970. As a result he was overpaid for 89 hours in the amount of \$884.66. He was advised by letter of December 16, 1970, of the need to repay that amount under the provisions of 5 U.S.C. §6306 (1970) and the fact that the leave covered by the refund "will not be re-credited until payment is made." Mr. Sabagh agreed to repay that amount at the rate of \$25 a pay period. Subsequently, in letter of February 5, 1971, he was requested to accelerate the rate of repayment by approving allotments of at least \$75 biweekly, "in order that your records can be cleared in six months rather than in approximately a year and a half that the \$25 allotment would take." Mr. Sabagh declined to raise the rate of repayments. Therefore, the \$25 deductions continued until full refund was made by the pay period ending January 8, 1972, when it was determined that recrediting of the 89 hours involved would exceed the maximum carryover ceiling for the leave year ending in January 1972, and that, consequently, such leave was to be forfeited under provisions in 5 U.S.C. §6304(a) (1970). Under the circumstances we held in our decision of September 1, 1972, on the basis of decisions 34 Comp. Gen. 17 (1954) and 38 Comp. Gen. 91 (1953) that the forfeiture in question was not the result of administrative error, but was primarily due to the employee's failure to make timely refund.

Our decisions have consistently held that the law governing refund of lump-sum payments and recredit of annual leave contemplates an immediate refund of the portion required to be refunded; that such requirement ordinarily should be a condition precedent to reemployment; and that as a practical matter and to more nearly effectuate the legislative intent of section 6306 when installment repayment is permitted, that use of the leave covered by the refund be denied until full refund has been made, even though reconstruction of the leave record at the time of final payment and as of the date of reemployment, results in forfeiture under the provisions of section 6304(a), supra. It follows, therefore, that since Mr. Sabagh's agency had followed these rulings in refusing to recredit his leave until final payment was made, there was no administrative error

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committed even though reconstruction of his leave account at the time of final payment and as of the time of reemployment, resulted in forfeiture of the leave covered by the refund.

Public Law 93-181, supra, in section 3(2), amends 5 U.S.C. §6304, by adding subsection (d), which provides in pertinent part in subsection (d)(1) 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;

* * * * *

shall be restored to the employee."

The above statute and implementing Civil Service Commission regulations provide for restoration of leave lost through administrative error. As indicated above the leave in this case was lost primarily because Mr. Sabagh delayed in repaying the excess lump-sum payment. In view of this and since Mr. Sabagh has not provided any evidence of any other administrative error affecting his leave account, we have no basis to direct restoration of the leave in question. Accordingly, the agency's determination not to restore the leave in question is affirmed.

R.F.KELLER

~~Director~~ Comptroller General
of the United States