

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

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**FILE:** B-212031**DATE:** September 27, 1983**MATTER OF:** Ismene M. Kalaris - Annual Leave for  
Attending Court Hearing**DIGEST:**

An employee brought an action in United States District Court against the Department of Labor (DOL) seeking to prevent her removal from her position by the Secretary of Labor. She was charged 4 hours of annual leave for time spent observing oral argument in her case. The District Court ruled she was improperly separated but the United States Court of Appeals upheld her separation. We will not disturb DOL's exercise of discretion to charge her annual leave since there is no basis for an unsuccessful plaintiff suing the Federal Government to have such time considered official time. Furthermore, 5 U.S.C. § 6322 granting court leave to jurors or witnesses does not apply here.

Ms. Ismene M. Kalaris, a former Administrative Appeals Judge, Benefits Review Board, Department of Labor (DOL), contests DOL's decision to charge her 4 hours of annual leave for time she spent observing oral argument in the case of In Re Benefits Review Board, Civil Action Nos. 82-1278, 82-1406, (D.D.C. June 2, 1982). For the reasons which follow, we uphold DOL's action charging Ms. Kalaris annual leave.

On June 1, 1982, Ms. Kalaris observed oral argument in the case of In Re Benefits Review Board, cited above, a case in which Ms. Kalaris was a plaintiff, challenging the validity of the Secretary of Labor's action removing two administrative law judges, one of whom was Ms. Kalaris, from their positions on the Benefits Review Board. The District Court held that the Secretary had no authority to remove the administrative law judges and the court declared the Secretary's action null and void.

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Ms. Kalaris was subsequently charged 4 hours annual leave for attending the oral argument. The Department of Labor cited Federal Personnel Manual (FPM) Bulletin 630-38, August 4, 1980, as authority for charging Ms. Kalaris annual leave. This FPM Bulletin is OPM's explanatory instruction on the entitlement of employees to court leave under 5 U.S.C. § 6322 which provides leave for jury or witness service. The FPM Bulletin states, in part, as follows:

"If the employee is a party in a suit against the Government, the time the employee-plaintiff spends in preparation for the trial, including answering the government's interrogatories, and the time the employee-plaintiff spends observing the conduct of the trial is not included within the word 'witness' and does not qualify for court leave. Annual leave or leave without pay is appropriate for such periods."

Ms. Kalaris argues that she is entitled to have the time she spent in court considered official time, and thus a charge of annual leave would be improper, because the legal action she initiated was taken to protect the Benefits Review Board's independence and to define the nature of the Board's duties. She, therefore, views her attendance at the hearing as an official act of a member of the board.

In this connection she cited two decisions of this office to support her view. In the first case cited by Ms. Kalaris, Wilma Pasake, 59 Comp. Gen. 290 (1980), we held that the plaintiff in a discrimination case was not entitled to court leave authorized by 5 U.S.C. § 6322 because her attendance was not required as a juror or witness. However, we held in Pasake that since she prevailed as a plaintiff against an employing Federal agency in a complaint brought under the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(c), she was entitled to official time for attendance at the trial and should not be charged annual leave or leave without pay. The reason for our holding in Pasake was that one of the purposes of the Civil Rights Act of 1964 was to make whole the employee who was discriminated against in Federal employment, and reasonable official time for someone pursuing a judicial remedy was accordingly proper under the Act. The second case cited by Ms. Kalaris, James L. Sweeney, B-201602, April 1, 1981, makes it clear that official time is only extended to prevailing plaintiffs and

not to unsuccessful litigants who alleged discrimination. Ms. Kalaris argues that even if she were a nonprevailing party, her time spent at the hearings would be considered official time.

Ms. Kalaris also states that a third member of the Benefits Review Board, Chief Judge Robert L. Ramsey, who was not separated by the Secretary of Labor and who was not a plaintiff but was a defendant in In Re Benefits Review Board, was allowed to attend the same hearing by DOL without charge to annual leave. Accordingly, Ms. Kalaris argues that DOL's action charging her annual leave was arbitrary.

Ms. Kalaris had appealed DOL's action charging her annual leave to our Claims Group. The Claims Group denied Ms. Kalaris' claim variously describing her claim as one for court leave or administrative leave. Settlement Z-2844371, November 18, 1982. Ms. Kalaris, in her appeal of our Claims Group's settlement, points out that she did not claim court leave or administrative leave but rather she claims that her attendance at the hearing was official business and she should not have been charged annual leave.

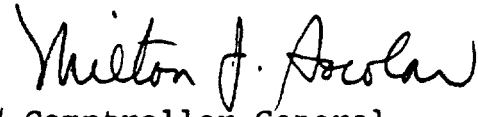
Since the date of Ms. Kalaris' appeal of our Claims Group's action, the United States Court of Appeals for the District of Columbia has issued a decision reversing the lower court's judgment that Ms. Kalaris was improperly fired. Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir. 1983). In the latter decision the court held that the Secretary of Labor did have authority to remove Ms. Kalaris and another member of the Benefits Review Board. Accordingly, aside from the fact that Ms. Kalaris did not file her complaint seeking relief under the Civil Rights Act, she was not a prevailing party in the litigation. Therefore, our decision Pasake, a case limited to the relief afforded successful complainants under the Civil Rights Act, has no application to Ms. Kalaris' claim.

The question remains whether DOL may properly find that the time spent by Ms. Kalaris in court observing oral argument in a case she brought against the Government and in which she did not prevail is not official business. We have ruled consistently that the granting of annual leave is within administrative discretion in respect to any period of time, and it is legally proper for an administrative office to charge an employee annual leave for periods during which

the employee is absent from an official duty station. It is immaterial in such cases that the employee had not requested the leave. See 61 Comp. Gen. 558, 560 (1982) and cases cited therein. In Ms. Kalaris' case she was absent from her regular worksite and was attending to business which was personal to her. The above cited cases, Pasake and Sweeney, show that there is no alternative but to charge annual leave or leave without pay to employees who sue the Government and who do not prevail.

Accordingly, we find that DOL did not abuse its discretion by charging Ms. Kalaris annual leave in these circumstances and in fact we find that there is no requirement in law to have the time Ms. Kalaris voluntarily chose to observe the arguments in her case to be considered as official business. The fact that another employee was not charged annual leave for his attendance at the hearing is of no aid to Ms. Kalaris. He was not a plaintiff in the case, and his attendance could have properly been viewed by DOL as being official business since he was named with the Secretary of Labor as a defendant in the case. In any event, we will not question DOL's exercise of its discretion to not charge leave to this other employee.

In view of the above, we find that DOL did not abuse its discretion in charging Ms. Kalaris 4 hours of annual leave for attending a hearing in a case in which she unsuccessfully sought to prevent the Government from removing her from her position.

*for*   
Comptroller General  
of the United States