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

FILE: B-214337 **DATE:** August 6, 1984

MATTER OF: John E. Brady - Restoration of Forfeited Annual Leave

DIGEST:

Employee went on sick leave on October 23, 1981, through the end of leave year 1981 and forfeited 104 hours of annual leave. Restoration of the forfeited leave and additional lump-sum leave are denied since the leave was not scheduled and the employee knew he was responsible to schedule the leave to avoid forfeiture. In addition, this case does not fall within our decisions which presume scheduling of the leave during an extended period of absence due to illness. Prior decisions distinguished.

ISSUE

The issue in this decision is whether an employee, who was on sick leave for over 2 months prior to the end of the leave year, may have 104 hours of forfeited annual leave restored to his account, so that these hours may be included in his lump-sum leave payment. We hold that the forfeited leave may not be restored since the annual leave was not scheduled prior to the end of the leave year, the employee knew it was his responsibility to schedule the leave to avoid forfeiture, and this situation does not fall within the ambit of our decisions which have presumed scheduling during an extended period of absence due to illness.

BACKGROUND

This decision is in response to the claim of Mr. John E. Brady for restoration of 104 hours of annual leave which were forfeited at the end of the 1981 leave year.

Mr. Brady was employed by the U.S. Customs Service as a District Director, grade GS-15, in Los Angeles, California, when he went on an extended period of sick leave beginning

October 23, 1981. The Customs Service notified Mr. Brady by letter dated November 20, 1981, of a proposed transfer to be effective January 4, 1982, but Mr. Brady declined the transfer on December 7, 1981. The Customs Service then proposed, by letter of December 23, 1981, to separate Mr. Brady for failing to accept the reassignment, and, after Mr. Brady did not reply to the charges, he was separated on February 5, 1982.

Mr. Brady forfeited 104 hours of annual leave which were in excess of the 240-hour ceiling and which were not scheduled for use by the end of the 1981 leave year. He has claimed restoration and lump-sum payment for those hours on the basis of his extended use of sick leave and a presumption that he would have scheduled use of his annual leave, citing our decision in Robert T. Good, B-182608, February 19, 1976. In addition, he argues that since he would not accept reassignment away from the Los Angeles area, he knew he would be separated from government service. Mr. Brady states that he anticipated separation before the end of the leave year which would have resulted in lump-sum payment for all accumulated annual leave, including the 104 hours he later forfeited.

The Customs Service denied Mr. Brady's claim on the basis that the annual leave subject to forfeiture was not scheduled for use prior to tne end of the leave year. The agency states that all employees were notified in October 1981, of their responsibility to schedule annual leave in order to prevent forfeiture. The Customs Service also distinguished our decision in Good since Mr. Brady's illness was shorter in duration, he was advised of the requirement to schedule annual leave, and he was aware of his annual and sick leave balances through copies of his biweekly payroll earnings statements.

DISCUSSION

Under the provisions of 5 U.S.C. § 6304(d)(1) (1976), annual leave which is forfeited due to the leave accumulation ceilings imposed by section 6304 may be restored if the forfeiture was due to administrative error, the exigencies of public business, or the sickness of the employee. For forfeiture due to the exigencies of public business or the sickness of the employee, the leave must have been scheduled for use in advance. 5 U.S.C. § 6304(d)(1)(B) and (C); 5 C.F.R. § 630.308 (1981). We have held that scheduling is a statutory requirement which may not be waived or modified even when extenuating circumstances exist. Michael Dana, 56 Comp. Gen. 470 (1977).

Our decisions have held, however, that where an employee has a prolonged illness preceding the end of the leave year, we presume that if the employee had been properly advised of his annual leave balance he would have requested scheduling in advance of annual leave otherwise subject to forfeiture. Robert T. Good, B-182608, February 19, 1976; and Clifford Lomax, B-187777, February 27, 1979. We have also extended this rationale to worker's compensation cases. Leonard J. Milewski, B-212294, January 24, 1984, 63 Comp. Gen. 180; and Robert W. Lochridge, B-193431, August 8, 1979.

Mr. Brady's situation is distinguishable from these cited decisions in several respects. First, unlike our decisions in Good and Lomax, there is evidence that Mr. Brady was aware of his responsibility to schedule the annual leave. The Customs Service contends that Mr. Brady received notification of this responsibility prior to his absence on sick leave. Although Mr. Brady denies receiving this notification, it is our long-standing practice in disputes of fact between a claimant and an administrative agency to accept the statements of fact furnished by the agency, in the absence of convincing evidence to the contrary, and leave the claimant his remedy in the courts. Louis Osbourne, B-197980, May 9, 1980. Also, as noted above, the Customs Service contends, and Mr. Brady does not deny, that Mr. Brady's bi-weekly payroll statements showed his leave balance, and that amount of annual leave that would be forfeited if not used by the end of the leave year.

Second, Mr. Brady's absence from duty is factually different from our prior decisions. In Good we considered the leave account of a U.S. Park Police officer who was injured on duty and was placed on "administrative sick leave" (excused absence due to duty-related injury) from February 1973, to January 1974, when he retired for disability. We held in Good that we presumed he would have scheduled use of his annual leave if he had been properly advised of his annual leave balance, citing the rationale in two decisions issued before the enactment of section 6304(d)(1) dealing with restoration of forfeited annual leave, B-178583, June 14, 1973, and B-176093, July 10, 1972.

In those latter decisions we permitted the retroactive substitution of annual leave for sick leave in order to avoid forfeiture of the annual leave where: (1) the employee's illness commenced a considerable period of time

prior to the end of the leave year; (2) the employee was therefore precluded from using his annual leave other than for illness; (3) the employee presumably would have avoided forfeiture of the leave if he had been advised of his leave balance; and (4) the lack of knowledge of his leave balance was not attributable to any fault on the part of the employee. B-178583 and B-176093, cited above.

We then applied this rationale to the situations presented in Good and in Lomax, cited above. In Lomax, the employee was on sick leave from March to December 1974, and then was on annual leave and leave without pay until his disability retirement was approved in March 1975. There we held that 56 hours of annual leave forfeited in leave year 1974 should be restored on the basis of our decision in Good.

Mr. Brady's situation is distinguishable from our decisions in Good and Lomax since Mr. Brady's period of illness was considerably shorter and it is not clear that Mr. Brady would have scheduled the leave to avoid a forfeiture. As noted above, Mr. Brady admits he was anticipating termination from government service which would result in lump-sump payment of all accumulated annual leave, and he expected separation prior to the end of the leave year. What Mr. Brady may not have realized is that the Customs Service would have to afford him at least 30 days' advance written notice before terminating him from government service. 5 U.S.C. § 7513(b) (Supp. III 1979) and 5 C.F.R. §§ 752.401-752.406 (1981). Since Mr. Brady did not decline reassignment from Los Angeles until December 7, 1981, thus providing a basis for his removal from government service, the agency had virtually no opportunity to propose removal, wait for 30 days for Mr. Brady's reply, and decide upon removal prior to the end of leave year 1981.

Therefore, we conclude that our decisions in Good and Lomax may not be applied to Mr. Brady's claim.

We also distinguish our decisions in Milewski and Lochridge, cited above, which involved employees who suffered work-related injuries and were receiving worker's compensation under the Federal Employees Compensation Act, 5 U.S.C. Chapter 81, when they forfeited annual leave at the end of the leave year. Applying the rationale set forth in our decision in Good, we permitted restoration of the forfeited annual leave in Milewski and Lochridge where the

employees were ill for a considerable period of time prior to the end of the leave year and were effectively precluded from using their annual leave.

Mr. Brady's situation is not similar to the facts presented in Milewski or Lochridge, and we find no basis to apply the holdings in those decisions to his situation.

Accordingly, we find no basis to permit restoration of the 104 hours of annual leave forfeited by Mr. Brady at the end of leave year 1981. His claim is denied.

for Milton J. Socolar
Comptroller General
of the United States