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

FILE: B-217080 **DATE:** June 3, 1985

MATTER OF: - Flexible Work Schedule - Office Closed Due to Weather Conditions

DIGEST:

Agency and union had negotiated agreement authorizing employees to use 5/4-9 flexible work schedule under 5 U.S.C. § 6122(a). Employee elected first day of pay period as extra day off or "flex day" under flexible schedule. When agency was closed for that entire day because of weather conditions, she claimed entitlement to an additional day off in lieu of that day. Employees taking day off or "flex day" under flexible schedule are in a nonpay status on those days, in contrast to employees on approved leave. Since the employee was not in a pay status on the day agency closed because of weather conditions, she has no entitlement to an additional day off. Her situation is not analogous to a holiday because employees are in pay status on holidays.

This matter was submitted to us as a request for an advance decision from the Acting Director, Personnel Division, Internal Revenue Service (IRS). It was submitted at the request of the National Treasury Employees Union (NTEU). The question presented is whether an employee on a flexible work schedule is entitled to an additional day off when the agency is closed because of weather conditions on a previously scheduled day off or "flex day." For the reasons set forth below, we hold that the employee has no entitlement to an additional day off without charge to leave or credit hours.

BACKGROUND

On March 4, 1983, a negotiated agreement between the IRS, Denver District, and the NTEU was signed creating an alternate work schedule program (AWS) for bargaining unit employees. Article 2 of the agreement makes available the 5/4-9 work schedule which, within a pay period of

10 workdays, consists of 8 9-hour days, 1 8-hour day and 1 nonworkday. With exceptions not relevant here, an employee may choose either of the Mondays or Fridays of the pay period as the designated nonworkday.

Ms. , an employee of the IRS Denver District Office, elected the first Monday of each 2-week pay period as her nonworkday. One such Monday was November 28, 1983. On that day a major snowstorm caused the Denver District Director, IRS, to close the district offices for the entire day. The IRS took the position that employees on the 5/4-9 schedule who had elected Monday, November 28, 1983, as their nonworkday or "flex day" would not be given an additional day off. The IRS reasoned that a nonworkday under an AWS is the equivalent of a Saturday or Sunday and that snow emergencies on a Saturday or Sunday do not entitle employees to an additional day off.

The union position is that the memorandum agreement establishing the 5/4-9 schedule is premised on the notion that for each 10-workday period, one of the workdays will become a nonworkday at the employee's choosing. The important fact, according to the union position, is that the day chosen must have first been a workday before it could be converted into a nonworkday by the employee's election. In support of its position the union refers generally to the Federal Personnel Manual, and specifically to the Internal Revenue Manual (IRM) 0601 and IRM 1273 which the union quotes as follows: "Whenever an emergency occurs and the office is closed the entire day, this is considered a nonworkday for leave purposes, and no leave is charged to regular employees who are in pay status." According to the union, since the emergency closure day is recognized as a nonworkday by the IRS manual, it is not a day that can be selected under the 5/4-9 schedule to be the employee's day off. The union believes that this situation is analogous to a holiday which would result in an "in lieu of" day off, and, therefore, should be treated in the same manner under an AWS.

OPINION

Alternative work schedules were first authorized by the Federal Employee's Flexible and Compressed Work Schedule Act of 1978, Pub. L. No. 95-390, 92 Stat. 755 (1978). After

that authority expired in 1982, the AWS program was again authorized, this time by the Federal Employees Flexible and Compressed Work Schedules Act of 1982, Pub. L. No. 97-221, 96 Stat. 227 (1982), which is codified as 5 U.S.C. §§ 6120 to 6133 (1982). This is the statutory authority for the March 4, 1983, agreement between IRS and NTEU. Under 5 U.S.C. § 6133(a), the Office of Personnel Management (OPM) is authorized to prescribe regulations for AWS programs, as it was under the 1978 Act.

A flexible schedule, such as the 5/4-9 schedule, worked by Ms. , is authorized by 5 U.S.C. § 6122(a), which provides that:

> "(a) Notwithstanding section 6101 of this title, each agency may establish, in accordance with this subchapter, programs which allow the use of flexible schedules which include--
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> "(1) designated hours and days during which an employee on such a schedule must be present for work; and
>
> "(2) designated hours during which an employee on such a schedule may elect the time of such employee's arrival at and departure from work, solely for such purpose or, if and to the extent permitted, for the purpose of accumulating credit hours to reduce the length of the workweek or another workday.
>
> An election by an employee referred to in paragraph (2) shall be subject to limitations generally prescribed to ensure that the duties and requirements of the employee's position are fulfilled."

Thus, an employee who is working a flexible, 5/4-9 schedule will account for 80 hours in each pay period in less than 10 workdays. Put another way, an employee on a flexible, 5/4-9 schedule will be in a pay status for 80 hours in each pay period, but those 80 hours will be completed in less

than 10 days. It must be remembered that employees who are in a sick or annual leave status on a regular workday are in a pay status.

It is true, as the union argues, that under an AWS, before a day during a pay period is designated as an employee's extra day off or "flex day," that day must be a normal workday. However, once a particular day is scheduled and approved as an employee's "flex day," then that day ceases to be a workday for the employee for the period of time covered by the schedule, and the employee is in a nonpay status during that day. We note that under the Agreement of March 3, 1984, between IRS and NTEU, once an employee chooses a flexible schedule, there are restrictions on when that schedule may be changed. Article 3, paragraph B of the Agreement provides that:

> "Employees under a work schedule in this agreement will remain under that schedule for at least two (2) pay periods. Employees electing to change a work schedule must request a change in writing from their supervisor at least one (1) pay period prior to the end of the two (2) pay periods. The election period for Tax Auditors must be three (3) pay periods prior to any change. All work schedules will start at the beginning of a pay period."

Thus, once a flexible schedule is selected by an employee, it is not easily changed. Within that schedule, for each 2-week pay period, under the 5/4-9 plan, there are 9 workdays during which the employee must account for 80 hours in a pay status through work, credit hours, or paid leave. The tenth day is the day off or "flex day," and the employee is not in a pay status on that day. Just as the agency argues, that day is analogous to a Saturday or Sunday.

We note that the IRS did not charge employees who were on scheduled annual or sick leave with leave for the snow day November 28, 1983. Employees who were on sick or annual leave on that day were in a pay status, and the

agency action in not charging their leave accounts following the closing of the agency was correct. See 43 Comp. Gen. 501 (1964); _ _ , B-194432, October 16, 1980.

Since employees who were on approved leave were in a pay status on November 28, 1983, but employees taking the day off as a "flex day" under a flexible schedule were in a nonpay status on that day, treating the two groups differently was correct.

The NTEU argues that the "flex day" is like a holiday and the employee is entitled to an "in lieu of" day when the agency is closed on a "flex day." However, the same distinction arises here as in the cases of annual and sick leave. On a holiday, an employee is in a pay status or, when the holiday falls on a nonwork day, an employee is entitled to be paid for the day by statute or Executive order. Under a flexible schedule, for the employee's extra day off or "flex day," there is no entitlement to pay for that day. Under this schedule an employee has voluntarily agreed to earn her pay for that pay period on the other 9 workdays of that pay period.

Accordingly, since Ms. was not scheduled to work on November 28, 1983, under her flexible schedule, she was in a nonpay status on that day and is not entitled to another day off without a charge to leave or credit hours.

for Milton J. Socolar
Comptroller General
of the United States