



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Leave Restoration for Judicial Branch Employees--
Application of Carryover Ceiling

File: B-230807.2

Date: September 13, 1991

DIGEST

Magistrate and bankruptcy judges and law clerks who are entitled to credit for annual and sick leave, which was initially not credited to them due to an erroneous agency position that they were not subject to the Annual and Sick Leave Act, cannot obtain credit for annual leave in excess of the statutory maximum carryover ceiling of 240 hours. Granting their claim for annual leave credit beyond the statutory maximum would result in a windfall to them and run counter to a judicial decision addressing comparable circumstances.

DECISION

This decision responds to a request by the Director of the Administrative Office of the United States Courts. The issue is whether federal magistrate and bankruptcy judges and law clerks are entitled to credit for annual leave exceeding 240 hours in connection with a determination that they were erroneously excluded from Annual and Sick Leave Act coverage from 1978 to 1987. We conclude that they are not entitled to credit beyond the 240-hour ceiling.

BACKGROUND

According to the Director of the Administrative Office, prior to 1978 it was generally assumed that magistrate and bankruptcy judges and law clerks were not covered by the Annual and Sick Leave Act, 5 U.S.C. §§ 6301 et seq. (hereafter the Leave Act). However, the General Counsel of the Administrative Office reconsidered their status following the enactment in 1978 of a statute that specifically excluded

Presidentially-appointed federal judges from the Leave Act.^{1/} Based primarily on this statute, the General Counsel concluded that judicial branch officers and employees other than Presidential appointees were subject to the Leave Act. Therefore, he recommended to the Judicial Conference in 1979 that these officers and employees be treated as covered by the Leave Act.

Notwithstanding the General Counsel's opinion, the Judicial Conference took the position that subjecting magistrate and bankruptcy judges, and to a lesser extent law clerks, to the Leave Act would be detrimental to the prestige of their offices and to the performance of their duties. Accordingly, the Judicial Conference directed that they continue to be treated as exempt from the Leave Act. At the same time, the Conference sought legislation to explicitly exempt them from the Act.

When such legislation had not been enacted by 1987, the Conference modified its position. By direction of the Conference, the Administrative Office notified magistrate and bankruptcy judges in a memorandum dated April 10, 1987, that they and their law clerks had the option of remaining exempt from or becoming subject to the Leave Act. They were also informed that they could submit records to have accumulated annual leave credited, but limited to a carryover balance of 240 hours under 5 U.S.C. § 6304(a).

In a clarifying memorandum dated November 27, 1987, the Administrative Office advised that: (1) the 1978 statute clearly placed all judicial branch employees except Presidential appointees under the Leave Act; (2) all such employees who claimed annual and sick leave using appropriate records were entitled to credit for leave balances and, upon separation from the government, to a lump-sum payment for unused annual leave; and (3) that the Administrative Office would honor all claims supported by appropriate documentation.

Among those seeking leave credit were two magistrate judges who claimed annual leave balances in excess of 240 hours. One

^{1/} The 1978 statute, Pub. L. No. 95-519, 92 Stat. 1819, specifically exempted from the Leave Act all Presidential appointees in the legislative and judicial branches of the federal government. The legislative history indicates that the statute was intended to clarify existing law and conform it to the practice at that time whereby most such officers already were treated as being exempt from the Leave Act. See H. R. Rep. No. 95-1496, 95th Cong., 2d Sess., 2-3, reprinted in 1978 U.S. Code, Cong. & Admin. News at 4159, 4160-61.

claimed credit for 847 hours of annual leave and the other claimed 1,836 hours of annual leave. The Administrative Office denied their claims for restoration of annual leave in excess of the statutory maximum carryover of 30 days, or 240 hours, of annual leave from one leave year to the next. See 5 U.S.C. § 6304(a).

The Judicial Improvements and Access to Justice Act, approved November 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642, resolved the Leave Act status of the judicial branch employees. Section 1003(a) of the Act, 102 Stat. 4665, expressly exempted magistrate and bankruptcy judges from Leave Act coverage, and likewise exempted law clerks unless they were specifically included under the Leave Act by the appointing judge or by local court rule. Section 1003(b) further provided that any individuals exempted by this section from the Leave Act could retain credit for their sick and annual leave balances as of the time of exemption, for application when they retired^{2/} or transferred to a pay system covered by the Leave Act.

ANALYSIS

While the Leave Act status of magistrate and bankruptcy judges before 1988 is not clear, we accept the position of the Administrative Office that these officers were subject to the Act's coverage from 1978 to 1988, and that it was administrative error to treat them as exempt from the Act during this period. The Leave Act applies generally to federal "employees," a term that includes under the applicable definitions individuals appointed by federal judges. See 5 U.S.C. §§ 6301(2), 2105, and 2104; see also Cutright v. United States, 21 Cl. Ct. 490, 493-94 (1990), and cases cited. Magistrate and bankruptcy judges as well as law clerks meet this definition.^{3/} Accordingly, the only issue is whether the statutory 240-hour carryover limit applies in calculating the annual leave balances for those officers who claim Leave Act coverage.

^{2/} The unused sick leave would be credited toward the employee's service computation date and the unused annual leave would be payable in a lump sum.

^{3/} Magistrate judges are appointed by federal district court judges, pursuant to 28 U.S.C. § 631(a); bankruptcy judges are appointed by the courts of appeals, pursuant to 28 U.S.C. § 152(a)(1); and law clerks are appointed by the judge for whom they work, pursuant to 28 U.S.C. §§ 156(a), 712, 752 and 794.

As noted previously, section 6304(a) of title 5 provides that an employee cannot carry more than 30 days, or 240 hours, of unused annual leave from one leave year to the next; annual leave in excess of this statutory maximum is forfeited. Section 6304(d)(1)(A), however, provides an exception, allowing the restoration of annual leave lost by operation of section 6304 because of "administrative error." Our prior decisions addressing the "administrative error" exception deal with employees who clearly were subject to the Leave Act. See, e.g., John J. Lynch, 55 Comp. Gen. 784 (1976); Carr and Seach, B-222221, Sept. 8, 1986; Isidro R. Yatar, B-201358, Aug. 24, 1981, and decisions cited. We have never addressed a situation in which failure to apply the Leave Act to employees constituted the alleged administrative error permitting restoration of annual leave above the statutory maximum.

We conclude that the concept of administrative error should not be extended this far. As the Administrative Office points out in its submission to us in this case:

"Between 1978 and April 1987, magistrates, bankruptcy judges, and law clerks received the benefits of not being covered by the Leave Act, in that they were not restricted by the requirements of hour-by-hour accountability of the Leave Act or the Leave Act's limitations on the amount of leave available to them. By now allowing these officers credit for annual leave accumulated from 1978 to [1988], they would in essence receive the benefits of both Leave Act coverage and exclusion. To further allow these officers to make post hoc determinations that, had they realized they were covered by the Leave Act, they would have taken sufficient leave to prevent accumulation of more than 240 hours is unduly speculative and would result in an unjustified windfall."

Adopting a similar rationale, the Claims Court recently held in Cutright v. United States, supra, that a court reporter who had been erroneously denied Leave Act coverage^{4/} for many years prior to 1984 could not obtain restoration of annual leave above the maximum carryover. The opinion observed:

"Defendant's administrative error does not, however, entitle plaintiff to 28 years of accrued annual leave. Under § 6304(a), plaintiff was entitled to

^{4/} The Cutright court held that the Administrative Office erroneously excluded the court reporter from Leave Act coverage under the exception for employees who do not have a regular tour of duty.

carryover a maximum of 240 hours of annual leave from one year to the next. Even with the operation of the forfeiture provision, plaintiff could not carryover more annual leave than permitted under § 6304(a). The court, therefore, holds that plaintiff forfeited all annual leave exceeding the maximum carryover set forth in 5 U.S.C. § 6304(a). . . . The court recognizes that plaintiff was excluded from the leave system prior to 1984, and was, therefore, unable to prevent the forfeiture of annual leave. However, a contrary result would put plaintiff in a better position than other employees covered by the Leave Act and thereby create a windfall for plaintiff not contemplated by the Act." 21 Cl. Ct. at 496-97.

It is true that, during the period between 1978 and 1987, these judicial officials were erroneously advised by the Judicial Conference that they were exempt from the Leave Act. In other words, they were advised that they were not subject to the limitation on the amount of annual leave available to them or to the provision allowing carryover of such leave. While this advice was erroneous, the fact that some of these judicial officials may have chosen to take a minimum amount of leave despite the erroneous advice that they were not subject to leave limitations does not logically establish that they would have taken more leave if they had been correctly advised that they were subject to the Leave Act. Under these circumstances, to permit restoration of annual leave for those officials in excess of the statutory maximum carryover of 240 hours would constitute an unjustified windfall.

We, therefore, agree with the reasoning of the Administrative Office and the Claims Court. Accordingly, we hold that the judicial branch officers here involved may not obtain restoration of annual leave beyond the statutory maximum carryover of 240 hours.

Milton J. Acosta
for Comptroller General
of the United States