

**DECISION**

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

FILE: B-180134

DATE: FEB 20 1975

MATTER OF: Adjustment of compensatory time and annual  
leave accounts

DIGEST: Claim that 1970 regulation requiring use of compensatory time prior to annual leave was applied retroactively and without notice, thus depriving employee of 70 hours leave is without foundation. Adjustment in leave account prior to effective date of that regulation was made based on previously effective regulation requiring use of compensatory time off within leave year in which it is earned. Adjustment in leave account based on 1970 regulation resulted only in reallocation of hours of leave between annual and compensatory time accounts without loss of any leave.

By letter of April 8, 1974, Mr. Michael J. Bottigliero requests reconsideration of the action of our Transportation and Claims Division denying him reinstatement of or compensation for 70 hours of annual leave and compensatory time which he claims was wrongfully taken from him in the course of a leave audit performed in 1971.

The leave audit in question covered the period from the end of the 1966 leave year, December 31, 1966, through September 18, 1971, and revealed that the Office of Economic Opportunity (OEO) had not maintained Mr. Bottigliero's leave account in accordance with applicable OEO instructions governing the taking of compensatory time off. By Claims Settlement Certificate Z-2533742, dated March 12, 1974, Mr. Bottigliero was denied the requested reinstatement of or payment for leave. That determination by our Transportation and Claims Division was based on OEO instructions in effect after June 3, 1965.

OEO Instruction No. 35, dated June 3, 1965, provides in pertinent part that work officially directed and performed in excess of the basic 40 hours each week be compensated by overtime pay or compensatory time off and requires that all compensatory time off be taken within the leave year in which it is earned and will not normally exceed 80 hours accumulation at any time. While not superseding that instruction, OEO Instruction No. 2305-1, dated April 3, 1970, reiterates its requirement that compensatory time off may not be accumulated in excess of 80 hours at the end

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of any pay period and that supervisors may not request or approve additional overtime for employees where it would cause the employee's compensatory time accumulation to exceed 80 hours. The later instruction further provides that, when available, compensatory time must be used before annual leave and that compensatory time may be used before sick leave. Supervisors of those employees carrying the maximum annual leave ceiling in addition to compensatory time are cautioned to provide opportunities to such employees to take leave in order to prevent loss of annual leave at the end of the leave year.

The above instructions were issued pursuant to the authority contained at 5 U.S.C. § 5543 and in accordance with 5 C.F.R. 550.114(c) which provides as follows:

"(c) The head of a department may fix a time limit for an employee to request or take compensatory time off and may provide that an employee who fails to take compensatory time off to which he is entitled under paragraph (a) or (b) of this section before the time limit fixed, shall lose his right both to compensatory time off and to overtime pay unless his failure is due to an exigency of the service beyond his control."

The Settlement Certificate disallowing Mr. Bottigliero's claim concludes with the following statement:

"Accordingly, since your agency under the regulations cited did specifically state that compensatory time must be utilized before annual leave credits are reduced, your claim for the return of 70 hours of leave may not be allowed."

The above language would suggest that for the entire period from December 31, 1966, through September 18, 1971, Mr. Bottigliero's leave account was adjusted based on the requirement contained in OEO Instruction No. 2305-1, supra, that compensatory time be used prior to annual leave.

In appealing the denial of his claim, Mr. Bottigliero argues that the contents of OEO Instruction No. 2305-1, supra, were never

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communicated to employees of the regional office and that a Government agency may not promulgate a regulation depriving employees of benefits already earned. Specifically, Mr. Bottigliero's claim of impropriety is as follows:

"While instruction No. 2305-1 may be a valid exercise of OEO's administrative powers, the problem with relying on that instruction is that it was never communicated to the employees of the Regional Office. Hence, they had absolutely no knowledge of this instruction until the audit was completed. Furthermore, as I previously noted, the new instruction was directly contrary to the old instruction.

"Thus, the result is that Mr. Bottigliero was not able to take whatever action was necessary to preserve his leave solely because of OEO's failure to inform him of the new regulation. Surely, no government agency can pass regulations which deprive their employees of benefits already earned then not tell the employees about it until it is too late for the employees to do anything about it. Some requirements of due process, such as adequate notice, adhere to the government."

A review of the method of adjustment in Mr. Bottigliero's leave accounts for annual leave and compensatory time off indicated that prior to April 3, 1970, his accounts were adjusted based only on the requirement contained in OEO Instruction No. 35, June 3, 1965, that all compensatory time be taken within the leave year in which it was earned. After April 3, 1970, his leave account appears to have been adjusted on the basis both of the requirement that compensatory time be taken within the leave year in which it was earned and that it be utilized prior to the taking of annual leave.

During the period prior to April 3, 1970, Mr. Bottigliero, with some frequency, had taken annual leave at his own discretion rather than compensatory time off to the end that he had failed to take compensatory time during the leave year in which it was earned. Thus, under OEO Instruction No. 35 such leave was forfeited.

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In the course of the leave audit, that number of hours of compensatory time which Mr. Bottigliero earned during the leave year was first reallocated from his annual leave account to compensatory time in order to reduce his compensatory time account to zero by the end of the applicable leave year. The effect was merely to assure that Mr. Bottigliero's account was adjusted in a manner to reduce his compensatory time account to zero for each leave year and to assure that he retained the maximum possible number of hours of annual leave at the end of that leave year. Thus, for the period covered by the leave audit from December 31, 1966, through April 3, 1970, the adjustments appear properly to have been made in accordance with the requirements of OEO Instruction No. 35. The audit could not, however, operate to enlarge his annual leave entitlement in excess of his annual leave ceiling since the compensatory time used in the adjustment had been forfeited by his failure to use it during the year in which earned. Thus, we find no proper basis to invoke the "administrative error" provision of Public Law 93-181.

For the remainder of the 1970 leave year after April 3, 1970, the effective date of OEO Instruction No. 2305-1, Mr. Bottigliero neither earned nor used compensatory time. At the end of that leave year his annual leave account stood at 190 hours, while his compensatory time account had properly been reduced to a zero balance. During the 9 months of the 1971 leave year preceding the leave audit, the claimant earned 24 hours of compensatory time off and 144 hours of annual leave, while for that same period he took 46 hours of annual leave and 8 hours of compensatory time off. In accordance with the requirement of OEO Instruction No. 2305-1 that compensatory time be taken prior to annual leave, 24 hours of annual leave which Mr. Bottigliero took prior to July 24, 1971, were reallocated to his compensatory time account reducing its balance to zero. Compensatory time which he took thereafter was deducted instead from his annual leave account, giving him a balance of 304 hours of annual leave. If unadjusted after April 3, 1970, Mr. Bottigliero's account as of the end of the audit period would have stood at 288 hours annual leave and 16 hours compensatory time. Thus, prior to and after implementation of OEO Instruction No. 2305-1, the claimant's annual leave and compensatory time accounts combined gave him a total of 304 hours of leave. Since he had until the end of the 1971 leave year to use the 64 hours of annual leave by which his account exceeded

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the statutory ceiling of 240 hours, we fail to see that the application of that instruction operated to deprive him of any leave entitlement.

For the reasons expressed above, reinstatement of or payment for 70 hours leave as requested by the claimant is denied.

R.F. HELLER

Deputy Comptroller General  
of the United States