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DECISION



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

FILE: B-195901

DATE: October 12, 1979

MATTER OF: To Employees of Temporary Commissions -
Application of the Leave Act

DIGEST: Employees of certain temporary commissions are subject to the Annual and Sick Leave Act since they are not specifically excepted from the Act and are employees as defined in section 2105, title 5, United States Code.

This is in response to a request from the Honorable Alan K. Campbell, Director, Office of Personnel Management (OPM), for a determination of the applicability of the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. § 6301 et seq. (1976), to employees of certain temporary commissions. DLG00925

The commissions involved are the National Transportation Policy Study Commission (NTPSC) and the National Alcohol Fuels Commission (NAFC). The following specific questions relating to the Commissions' employees have been raised: DLG03031
DLG03032

- "(1) Do executive branch employees who transfer to either Commission without a break in service remain subject to the leave system in chapter 63 of title 5, United States Code?
- "(2) Are other employees of the Commissions subject to the leave system in chapter 63?
- "(3) If the reply to either (1) or (2) is negative, is the application of your decision required to be retroactive? May the coverage under the leave system be continued for a reasonable period of time while legislation is sought to provide such coverage?"

The Director also states that he has similar questions relative to the National Commission on Air Quality (NCAQ). DLG01378

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In addition, we have been asked to consider the specific case of Dr. Edward J. Bentz, Jr., currently employed as a member of the staff of NTPSC, who was offered a position with NAFC at a pay rate equal to an Executive Schedule (ES) level II.

Section 154(a)(1) of the Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, 90 Stat. 425 (1976), established the NTPSC. The Commission is comprised of 19 members, 6 appointed by the President of the Senate from the membership of the Senate, 6 by the Speaker of the House from the membership of the House, and 7 public members appointed by the President.

The Commission is authorized to appoint and fix the compensation of a Staff Director, and such additional personnel as may be necessary to enable it to carry out its functions. The Director and personnel are exempted by the Act from the provisions covering appointments in the competitive service (5 U.S.C. § 3301 et seq. (1976)), and without regard to the provisions of title 5 relating to classification and General Schedule pay rates (5 U.S.C. §§ 5101 et seq. and 5331 et seq. (1976)). However, no employee other than the Staff Director can receive compensation in excess of the maximum rate for GS-18 of the General Schedule. The Staff Director is to be compensated as an ES-II.

The NAFC was established by section 170(a)(1) of the Federal-Aid Highway Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689 (1978). The NCAQ was established by section 313 of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 785 (1977). Since all three Commissions are analogous in most respects, we need only consider the employees of NTPSC as representative of the group.

The OPM has stated that, normally, the Leave Act applies only to employees of executive agencies, and there is no clearly settled definition of executive agency with respect to commissions composed of both legislative and executive officials. The OPM also says that because the legislation is silent as to the executive or legislative

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status of NTPSC, and because of its mixed composition, the question arises whether it comes within the definition of an executive agency and whether its employees are, therefore, subject to the leave system under chapter 63 of title 5.

In B-194074, March 26, 1979, this Office considered the status of NCAQ, and determined that it was a legislative branch agency. The similarities between that Commission and NTPSC and NAFC could lead us to the same conclusion with regard to them. However, we do not feel that it is necessary to designate those two Commissions as legislative or executive in order to reach a necessary determination.

The Court of Claims in Sauer v. United States, 354 F.2d 302 (Ct. Cl. 1965), held that an employee of the judicial branch was covered by the Leave Act because it applies to all civilian officers and employees of the United States, with exceptions that were not applicable. Our Office has followed this rationale in a case involving a judicial employee. B-191044, November 28, 1978. Further, the Annual and Sick Leave Act was amended and clarified in 1978, Pub. L. No. 95-519, 92 Stat. 1819, to exclude from the Leave Act an officer in the legislative or judicial branch who is appointed by the President. Thus, all three branches of the Federal Government are included in the Leave Act.

The employees of the Commission also come under the provisions of the Leave Act by definition. Title 5 of the United States Code, section 6301(2)(A), states that an employee means an employee as defined by section 2105 of title 5. That section states in pertinent part:

"(a) For the purpose of this title, 'employee,' except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--

"(1) appointed in the civil service by one of the following acting in an official capacity--

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"(A) the President;

"(B) a Member or Members of Congress,
or the Congress;

* * * * *

"(D) an individual who is an employee
under this section;

* * * * *

"(2) engaged in the performance of a
Federal function under authority of law or
an Executive act; and

"(3) subject to the supervision of an
individual named by paragraph (1) of this
subsection while engaged in the performance
of the duties of his position."

The Commission is made up of Members of Congress and members of the public appointed by the President. The Commission in turn appoints a Staff Director and such other personnel as may be necessary to enable it to carry out its functions. The employees of the Commission come within the purview of the definition of an employee because they are appointed by the Commission, which is composed of Members of Congress and members of the public appointed by the President, or an employee of the Commission with delegated authority to make appointments. They are also engaged in the performance of a Federal function, preparation of a report to Congress and the President, and are subject to supervision of the Commission or an employee whom it has appointed.

The employees of the Commissions receive administrative support from the General Services Administration, an executive agency, and each has a different appropriation from which to draw separate and apart from Congress. Thus, the employees do not come within the definition of "congressional employees" in 5 U.S.C. § 2107 (1976), and, therefore, are not subject to an exception for employees

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of Congress which would exclude them from the provisions of the Leave Act. 5 U.S.C. § 6301(2)(B)(vi) (1976). Nor do any of the other exceptions in the Act apply.

We, therefore, conclude that the employees of the Commissions are subject to the leave system in chapter 63 of title 5, United States Code. Your first two specific questions are answered in the affirmative; therefore, we need not consider your third question.

Dr. Bentz' annual and sick leave entitlement should be handled in accordance with the above.

R. F. Keller.

Deputy Comptroller General
of the United States