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**DECISION**



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

**FILE: B-187104**

**DATE: March 8, 1978**

**MATTER OF: George D. Simpson and Olin C. Stewart -  
Restoration of annual leave**

- DIGEST:**
1. Annual leave forfeited at end of leave year by employee, who was to be mandatorily retired for age, but kept on rolls without break in service, under "exigency" certification, may not be restored to employee's leave account under 5 U. S. C. 6304(d)(1), since advance scheduling requirement was not met and may not be waived, 58 Comp. Gen. 470 (1977).
  2. Employee being compensated for work related injury and on rolls of Office of Workman's Compensation Program (OWCP), may not have excess annual leave forfeited at end of leave year restored to credit, since controlling law makes no provision for restoring such leave without advance scheduling requirement.

This action is in response to a letter dated June 20, 1977, from James B. Hammett, Acting Administrator, Southwestern Power Administration, United States Department of the Interior, requesting our decision concerning the propriety of the restoration of annual leave in the cases of two employees, in circumstances stated as follows:

"Case No. 1 - George D. Simpson

Mr. Simpson was scheduled to retire mandatorily due to age on December 31, 1975. However, as shown in the attached letter from the U. S. Civil Service Commission dated June 28, 1976, Mr. Simpson was exempted from mandatory separation for age retirement until December 31, 1976. Mr. Simpson did not schedule 112 hours of annual leave accrued during leave year 1976, in light of his pending mandatory retirement at the end of the year. Instead, he opted to be paid a lump-sum for 240 hours carryover plus the 112 hours accrued during the year. Since the conditions which prompted Mr. Simpson's exemption from mandatory retirement still existed at the time he was to be separated, the former Administrator,

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Mr. Peter C. King, asked Mr. Simpson to remain as a reemployed annuitant to which Mr. Simpson agreed. Mr. Simpson occupied a 'Key' position, requiring Secretarial approval before staffing can be accomplished (See memorandum attached dated December 3, 1976). The approval from the Secretary's Office for Mr. Simpson's reemployment was verbally given on December 31, 1976, with the actual approval document being received in our office January 3, 1977. Mr. Simpson was reemployed as an annuitant on January 1, 1977, without a break in service and the 112 hours excess leave was restored to his leave account.

"As can be gleaned from this background information, there was insufficient time remaining to schedule the excess 112 hours to avoid forfeiture. Understandably, from Mr. Simpson's point of view, there was no reason to schedule the leave since he was to be mandatorily retired, and it was not known sufficiently in advance that he would be reemployed to permit taking the excess leave. The exigencies of the public business are clearly established as the reason for reemployment, and failure by the agency to timely seek his reemployment to permit advance scheduling of the leave, were contributing factors in our decision to restore the leave."

"Case No. 2 - Olin C. Stewart

"Mr. Stewart suffered a traumatic disabling injury on February 6, 1975, while performing his official duties; requiring hospitalization, surgery, and subsequent prolonged convalescence. Mr. Stewart was placed on the rolls of the U. S. Department of Labor, Office of Workers' Compensation Programs (OWCP), on March 23, 1976, and has been compensated under the Federal Employees' Compensation Act, 5 U.S.C. 8101 et seq., from that date to the present. At the time of his injury, Mr. Stewart had a carryover balance of 240 hours of annual leave and had accrued an additional 48 hours of annual leave from the beginning of the leave year to the date he entered on the rolls

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of the OWCP. Since Mr. Stewart was placed on Leave Without Pay while being compensated by OWCP during the remainder of the 1976 leave year, it was not feasible to restore him to duty for the purpose of scheduling and/or taking the 48 hours of excess annual leave, nor do we feel it would have been proper. It would appear reasonable to restore the 48 hours in a special account to be used by Mr. Stewart upon his return to duty within the time limit established by the U.S. Civil Service Commission for use of such leave. The regulations are not clear in this matter. However, it would also seem reasonable to conclude that in the interest of equity when passing the legislation, Congress did not intend to deprive benefit of leave restoration to employees injured in the line of duty while they are on the rolls of OWCP and being compensated as in Mr. Stewart's case."

The submission states that our decision in Michael Dana, et al. - B-187104, April 1, 1977 (56 Comp. Gen. 470), prompted the request for decision covering the leave situations of Messrs. Simpson and Stewart, described above.

In 56 Comp. Gen. 470 (1977), supra, it was held that annual leave forfeited at the end of the leave year, allegedly due to exigencies of the public business but not scheduled in advance, may not be restored under 5 U.S.C. 6304(d)(1), even if the employees did not have actual notice of the scheduling requirement and it was known in advance that leave would not be granted if scheduled. The decision also stressed that scheduling is a statutory requirement which may not be waived and failure to give actual notice of this requirement is not administrative error since employees are charged with constructive notice of it.

In applying the rationale of the foregoing decision to the situation presented in Case No. 1--George D. Simpson--there is no dispute that the 112 hours of annual leave were not scheduled in advance for use by Mr. Simpson. However, it is stated that Mr. Simpson contemplated that he would have been paid a lump-sum leave payment for all unused annual leave to which he was entitled upon his separation for mandatory retirement. Therefore, had he retired on December 31, 1976, he would have been paid a lump-sum leave payment representing

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his 240 hours leave ceiling plus the 112 hours accumulated leave for 1976. But the fact remains that he did not retire on December 31, 1976, as originally contemplated, and with the permission of the Civil Service Commission remained on the rolls without a break in service, under admittedly extenuating circumstances arising from his expertise in pending court cases.

As set out in 56 Comp. Gen. 470 (1977), the pertinent controlling law, 5 U. S. C. 6304(d)(1), was added to title 5 of the United States Code by subsection 3(2) of Public Law 93-181, approved December 14, 1973, 87 Stat. 705, which provides as follows:

"(d)(1) Annual leave which is lost by operation of this section because of--

"(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

"(B) exigencies of the public business when the annual leave was scheduled in advance; or

"(C) sickness of the employee when the annual leave was scheduled in advance;

shall be restored to the employee."

The Civil Service Commission has, pursuant to 5 U. S. C. §6304(d)(2) (Supp. III, 1973) and §6311 (1970), issued regulations implementing the provisions of 5 U. S. C. §6304(d)(1) (Supp. III, 1973). These regulations, issued under statutory authority, have the force and effect of law. The Civil Service Commission's regulations appear at title 5 of the Code of Federal Regulations, part 630, subpart c.

Section 630.308 of 5 C. F. R., provides as follows:

"Beginning with the 1974 leave year, before annual leave forfeited under section 6304 of title 5, United States Code, may be considered for restoration under that section, use of the annual leave must have been scheduled in writing before the start of the third bi-weekly pay period prior to the end of the leave year."

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With respect to the foregoing, our Office has held that the advance scheduling requirement under 5 U. S. C. 6304(d)(1)(B) may not be waived or modified even where extenuating circumstances exist. 56 Comp. Gen. 470 (1977). In other words, merely certifying "exigencies of the public business" as authority for restoring lost annual leave does not satisfy the statutory requirement. There must be an advance scheduling of such annual leave in advance (before the start of the third bi-weekly pay period prior to the end of the leave year), coupled with the "exigency" requirement.

The Court of Claims has recently recognized this requirement in an order dismissing plaintiff's petition in the case of Joseph W. Ryan, Jr. v. United States, Ct. Cl. No. 24-76, order dated November 12, 1976, wherein the court stated, as follows:

"The legislative history of Pub. L. 93-181, which added the relevant part of 5 U. S. C. §6304 now at issue, illustrates that Congress was aware of and interested in the scheduling of annual leave in advance requirement. The purpose of 5 U. S. C. §6304(d)(1)(B) is not to penalize the employee who previously planned for and scheduled a certain amount of annual leave and then is prevented from using it due to the exigencies of the public business. However, the employee who does not pre-schedule his annual leave runs the risk of forfeiture." (Emphasis added.)

We recognize that this may seem exceedingly harsh in a situation where an employee, but for his voluntarily agreeing to remain on the rolls after his mandatory retirement date, would have received payment for such forfeited annual leave. However, the controlling statute and regulations issued in this respect, leave no choice but to treat this employee the same as any other employee in the matter of restoration of forfeited annual leave.

Accordingly, the administrative action taken to restore excess annual leave in the Simpson case was improper under the circumstances described and payment for 112 hours annual leave is not authorized.

The situation presented in Case No. 2--Olin C. Stewart--arising from a work-related injury wherein the employee seeks restoration

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of 48 hours annual leave forfeited as an incident to his acceptance of compensation under the Federal Employee's Compensation Act, 5 U. S. C. 8101, et seq., differs from the Simpson situation, in the cause of forfeiture of excess annual leave, i. e. "sickness." In this respect, 5 U. S. C. 6304(d)(1)(C) recognizes the situation where annual leave lost by operation of law wherein the "sickness of the employee when the annual leave was scheduled in advance" forms a basis for restoration. But, again, we must adhere to the requirement that the annual leave be scheduled in advance. In related circumstances, we have held that exceptions to the forfeiture rule are not applicable even where annual leave was reinstated after a "buy back" of annual leave. Helen Wakus, B-184008, March 7, 1977. Therefore, even the "buy back" situation of annual leave would not serve in the present case to preserve the 48 hours of annual leave involved. We know of no authority for restoring such excess leave in the present situation.

The second question is answered accordingly.

  
Deputy Comptroller General  
of the United States