



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

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The Honorable Kevin D. Rooney
Assistant Attorney General
for Administration
United States Department of Justice

Dear Mr. Rooney:

This replies to your letter of July 29, 1977, requesting the concurrence of the Comptroller General in a proposed Department of Justice order entitled "ADMINISTRATIVE LEAVE FOR LAW ENFORCEMENT EMPLOYEES WHILE UNDERGOING INVESTIGATION BASED UPON AN ALLEGATION OF MISCONDUCT."

Summarily stated, this order would permit law enforcement employees to be placed on "administrative leave"--non-duty status with pay and without charge to annual or other paid leave for as long as 45 calendar days when it is necessary to investigate allegations of misconduct against them, provided (1) there is insufficient evidence to warrant initiation of adverse actions against them, such as suspensions or removals, and (2) other alternatives, such as temporarily assigning them to different duties, are not feasible.

We do not doubt the need for a means of dealing with the problem addressed by the order, not only for law enforcement personnel but also for other employees. However, it is our opinion that legislation would be needed to permit the proposed solution since we are unaware of any existing statutory provision which could reasonably be construed to authorize the expenditure of appropriated funds to pay salaries of employees in a non-duty status for the extended period here contemplated.

Your position paper appears to find authority for the Civil Service Commission to issue regulations permitting the proposed administrative leave in 5 U.S.C. § 6104 (1970) and the implementing Executive Order No. 10552, August 11, 1954, delegating the President's authority to regulate to the Commission. However, we concur with the Commission's conclusion that this section does not authorize such regulations. In pertinent part this statutory provision reads as follows:

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"§ 6104. Holidays; daily, hourly, and piece-work basis employees.

"When a regular employee * * * whose pay is fixed at a daily or hourly rate, or on a piece-work basis, is relieved or prevented from working on a day--

* * * * *

"(2) by administrative order under regulations issued by the President * * *

* * * * *

he is entitled to the same pay for that day as for a day on which an ordinary day's work is performed."

This section had its inception in a joint resolution of the 48th Congress, approved January 6, 1885, 23 Stat. 516, entitled "Joint resolution providing for the payment of laborers in Government employ for certain holidays." It does not apply to employees whose compensation is fixed on a per annum basis. Such employees have always been granted compensation for holidays, office closings, and certain other limited situations when no work was performed. Employees with pay fixed at a daily or hourly rate, or on a piece-work basis, however, generally were not paid when they did not work prior to the enactment of the statutory provisions from which section 6104 is derived. The purpose of the section is, therefore, to place these two categories of employees on equal footing with regard to absence from work with pay and without charge to leave.

The specific provision to which the position paper refers-- "(2) by administrative order under regulations issued by the President* * *"--was added to the law by Public Law 395, 83d Congress, June 11, 1954, 68 Stat. 249. Its legislative history indicates that it was intended to permit per diem, per hour, and piece-work employees to be paid for excused absences for short periods when necessitated by weather conditions, i. e., excessive heat, snow, etc., or closing of plants for a brief period of time, or to permit participating in blood-donor campaigns, voting, or attending parades in

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honor of visiting dignitaries. It does not apply to situations of several weeks or months duration. See H. Rep. No. 1185, 83d Congress, February 8, 1954, and S. Rep. No. 1470, 83d Congress, May 27, 1954.

The only statutory provision we are aware of which specifically recognizes the general authority of an executive agency to grant administrative leave is 5 U.S.C. § 5326, enacted by Public Law 90-588, October 17, 1968, 82 Stat. 1151. This section authorizes up to 3 days absence with pay and without charge to leave for funerals of immediate relatives who die as a result of serving in the Armed Forces in a combat zone. Subsection (c) of this section provides: "This section shall not be considered as affecting the authority of an Executive agency, except to the extent and under the conditions covered under this section, to grant administrative leave excusing an employee from work when it is in the public interest."

However, in our view, this provision did not grant any broad new authority for administrative leave but merely sanctioned previously issued decisions, regulations, and instructions regarding such leave. See the Congressional Record for October 4, 1968, at page S12107 wherein it is stated: "The House of Representatives has added a perfecting amendment to the effect that this leave [funeral leave] shall not be construed to interfere with or diminish any administrative leave now authorized for Federal employees." (Underscoring added.)

Moreover, the Chairman of the Civil Service Commission, Mr. Alan K. Campbell, in his letter of August 30, 1977, to us in support of your request, recognizes that neither existing law, Executive orders, nor Comptroller General rulings give the Commission a legal basis for regulating in the area of excused absence. The Executive Director of the Commission, Mr. Raymond Jacobson, in his letter of March 21, 1977, to Mr. Pommerening, expressed a similar view and stated that the Commission planned to seek the necessary authority at an early date through appropriate means. However, Mr. Jacobson also expressed the opinion that "your department has authority under general statutory delegations to department heads such as that contained in 5 U.S.C. § 301 to issue appropriate administrative regulations to accommodate the situation under discussion." This section is derived from section 161 of the Revised Statutes and provides as follows:

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"The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

In subchapter II of chapter 83, title 5, United States Code, the Congress has established boundaries or guidelines for paid leave other than annual and sick. In one instance, 5 U.S.C. § 6321, it has seen a necessity for statutory authorization for as little as 4 hours. In another, 5 U.S.C. § 6326(c), supra, it has acknowledged the limitations which have been placed on the discretion of agencies to grant administrative leave by decisions of this Office, and regulations of the Civil Service Commission. In view thereof we do not believe section 301 can reasonably be construed so broadly as to permit the granting of administrative leave by regulations to the extent here proposed since this would, in our view, be tantamount to legislating. This section does not confer legislative power on agencies to enlarge conditions imposed by statute. United States v. George, 228 U.S. 14 (1913). See also 53 Comp. Gen. 1054 (1974) wherein it was held that there is no legal authority to implement an arbitrator's award granting 30 days administrative leave to an injured employee unable to perform his regular duties but able and willing to perform other duties had they been assigned to him.

With regard to practices of state and local law enforcement agencies, we note that in the District of Columbia at least there is statutory authority for members and officers of the Metropolitan Police Force being suspended with or without pay. Title 4, District of Columbia Code, section 121.

Accordingly, our opinion is that the matter here involved is one for resolution by the Congress. We must, therefore, respectfully decline to concur with your proposed order.

Sincerely yours,

R.F. KELLER

~~Ernie~~ Comptroller General
of the United States