PLM-II

DECISION

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

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FILE: B-180010.12 DATE: March 8, 1979

MATTER OF: John P. Mitchell - Additional leave, backpay, and per diem

[Agency Treatment of Employee Leave Incident to Work-Related Injury]

DIGEST: 1. Employee who suffered work-related injury objects to agency action not crediting him with accrual of annual and sick leave while he was on leave without pay status to receive compensation under Federal Employee's Compensation Act, 5 U.S.C. §§ 8101 et seq. Agency action was proper as 5 U.S.C. § 8116(a) provides that employee receiving compensation under Act may not receive salary, pay, or remuneration of any type from United States except for stated exceptions. 66

2. Employee used annual and sick leave in leave years 1974 through 1976 incident to work-related injury; elected to buy back leave used and accept compensation for injury under the Federal Employee's Compensation Act, 5 U.S.C. §§ 8101 et seq. Annual leave reinstated as a result of buy back is subject to forfeiture rule in 5 U.S.C. § 6304(a) since it was leave used rather than forfeited and therefore such leave cannot be restored under 5 U.S.C. § 6304(d). 67

3. Employee's use of leave may not be waived under waiver statute 5 U.S.C. § 5584 (1976). Use of leave which has been erroneously credited may only be waived where later adjustment of an employee's leave account results in a negative balance in annual leave account. See Matter of Lamoyne J. DeLille, 56 Comp. Gen. 824 (1977). 41

4. Agency grievance examiner held that agency violated nondiscretionary promotion policy and ordered agency to provide employee with promotion and backpay under 5 U.S.C. § 5596 retroactive to August 29, 1975, which action agency implemented. Employee claims that promotion and accompanying

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backpay should have been retroactive to April 14, 1975, as he alleges that he would have been promoted to higher grade at that time had agency carried out nondiscretionary promotion policy. Claim may not be allowed as employee has not submitted evidence to establish claim and burden is on claimant to furnish substantial evidence to establish liability of Government.

5. Employee on temporary duty elected to drive his automobile in lieu of authorized travel by common carrier suffered an intraocular hemorrhage while returning from temporary duty station and claims additional per diem in connection with his illness. Where illness, occurred subsequent to time of employee's constructive scheduled return by common carrier claim may not be allowed. Paragraph C10156-2 of JTR provides allowable travel time is limited to constructive scheduled travel time of common carrier used in computing per diem when travel by POV is not advantageous to Government.

Captain Robert V. Kurris, Finance and Accounting Office, Department of the Army, Rock Island Arsenal, has forwarded for our decision a claim by John P. Mitchell, concerning agency treatment of leave incident to his work-related injury and compensation therefor during the period March 3, 1974, through August 28, 1976. Mr. Mitchell raises a number of questions including accrual of leave during the compensation period, crediting of leave for intermittent duty, and the amount of leave balances shown on the agency records. Additionally, Mr. Mitchell has submitted two other claims unrelated to the work-related injury claim, i.e., (1) he claims a retroactive promotion with backpay for the period April 13, 1975, through August 28, 1975, for alleged failure of the agency to follow its nondiscretionary promotion policy; and (2) he appeals a disallowance by our Claims Division of his claim for additional per diem for the period October 25, 1970, through November 15, 1970, incident to his becoming ill during his return from a temporary duty assignment.

LEAVE COMPUTATIONS

The record shows that on February 28, 1974, Mr. Mitchell suffered a work-related injury while an employee of the Department of the Army at Fort Monmouth, New Jersey. During the period of his disability which ended August 28, 1976, he worked intermittently and used varying amounts of leave pending a determination on his claim for disability compensation filed with the Department of Labor under the Federal Employee's Compensation Act, 5 U.S.C. §§ 8101-51.

Upon the approval of his claim Mr. Mitchell decided to buy back his leave by arranging to have his employee's compensation payments from the Department of Labor paid directly to the Department of the Army. Buy back of leave is permitted by 20 C.F.R. § 510.310.

In connection with a work-related injury 5 U.S.C. § 8118 provides in part that an employee may use annual or sick leave to his credit, but that compensation for the disability may not begin during the period of paid leave. A buy back of leave involves the substitution of leave without pay (LWOP) for the paid leave, the leave bought back being recredited to the employee's leave account.

Accrual Of Leave During Compensation Period

Mr. Mitchell has objected to the fact that annual and sick leave did not accrue during the period he was placed on a LWOP status as a result of his buy back. He contends that the Employee's Compensation Act does not preclude such leave accrual.

Section 8116 of title 5, United States Code, provides in part that, except for certain specified payments enumerated therein an employee who is receiving compensation under the Federal Employee's Compensation Act may not simultaneously receive salary, pay, or remuneration of any type from the United States. Since the right to annual leave is a type of renumeration, there is no authority for crediting (accruing) annual leave during periods when an employee is on LWOP for the purpose of receiving disability compensation. B-164617, April 13, 1972; and 29 Comp. Gen. 73 (1947).

Crediting Leave For Intermittent Duty

Mr. Mitchell urges that there is no need to prorate the accrual of leave. The applicable regulation for crediting leave for the periods of his intermittent duty is set forth in 5 C.F.R. § 630.204 (1976) which provides that when an employee's service is interrupted by a non-leave earning period he earns leave on a pro rata basis for that portion of a pay period in which he was in a pay status. See also 32 Comp. Gen. 310 (1953); Federal Personnel Manual (FPM) chapter 630, para. 2-3c, and FPM Supplement 990-2, Book 630, para. S2-3d.

FPM Supp. 990-2, Book 630, para. S2-3c(2) provides a table as a guide in determining the amount of pro rata credit for accrual of annual and sick leave when an employee's service is interrupted by a non-leave earning period. See also 5 C.F.R. §§ 630.303 and 630.406. Accordingly, the pro rating of leave was required.

The Rock Island Arsenal has furnished copies of Mr. Mitchell's corrected leave record, DA Form 2451, from his former duty station, Fort Monmouth, New Jersey, for the pay period beginning January 5, 1974, through December 4, 1976. He transferred without a break in service to Rock Island Arsenal on December 1, 1976.

The employing agency has primary responsibility for maintaining accurate leave accounts and we are not in a position to alter such accounts based upon an employee's general assertion of inaccuracy. We have, however, reviewed corrected leave records for the period March 3, 1974, through August 28, 1976, to determine if any errors were made in the computations involved. The agency properly pro rated Mr. Mitchell's credit for annual and sick leave for the fraction of each pay period he worked intermittently. However, there is a 1-hour computation error in the annual leave balance as of November 8, 1975. The Corrected Leave Record shows an annual leave balance as of November 8, 1975, of 376 hours rather than 375 hours. Regarding leave balances as shown by Record of Leave Data, SF-1150 prepared by Fort Monmouth, Mr. Mitchell has raised some specific questions.

On an SF-1150 dated August 30, 1977, his leave balance as of November 20, 1976, was shown as 361 hours of annual and 385 hours of sick leave, whereas on an SF-1150 dated October 19, 1977, his respective annual and sick leave balances were 327 hours and 296 hours, a difference of 34 annual and 89 hours sick leave.

This difference is due to the agency earlier crediting him with full accrual of annual and sick leave during the period his service was interrupted by his being placed on LWOP for the purpose of receiving employee's compensation. The October 19, 1977 SF-1150 properly records the accrual of annual and sick leave pursuant to 5 C.F.R. § 630.204, supra, for the time he was in a leave earning status-the intermittent time he worked. For the 71 pay periods from March 3, 1974, through November 20, 1976, Mr. Mitchell would have accrued a total of 284 hours of sick leave if he had been in a leave earning status during the entire period. As his service was interrupted by non-leave earning periods, his pro rata sick leave accrual for this period was 195 hours. Concerning his balance of annual leave both, SF-1150's show that he entered the 1976 leave year with the the maximum allowable carry-over of 240 hours of annual leave. Since he earned annual leave at the rate of 8 hours per biweekly pay period he would have accrued 184 hours of annual leave as of November 20, 1976, had he been on a leave earning status. As his leave earning status was interrupted by his being on LWOP, his pro rata accrual of annual leave was 155 hours, a difference of 29 hours. The remaining 5 hours difference in his annual leave balance is due to the SF-1150 dated October 19, 1977, showing the use of 68 hours of annual leave during the leave year whereas the SF-1150 dated August 30, shows a charge of only 63 hours of annual leave. Nothing in our files can resolve this difference and we must accept the later computation by the agency as being correct. Incident to Mr. Mitchell's transfer from Fort Monmouth to Rock Island Arsenal on December 1, 1976, he was not credited with any annual or sick leave accrual for the pay period November 21, 1975, through December 4, 1976. The pay period at Rock Island Arsenal, to which he was transferred without a break in service, began on

November 27, 1976, and ended on December 11, 1976. Pro rata credit of leave is allowed for fractional pay periods caused by transfers between positions which have different pay periods. B-134086, October 31, 1957. Accordingly, he should be credited with a pro rata accrual of annual leave for his final pay period at Fort Monmouth. Credit for his initial pay period at Rock Island Arsenal was apparently made in accordance with the fractional pay period served at that duty station. It appears that Mr. Mitchell is entitled to an accrual of 4 hours of annual leave and 2 hours of sick leave for the partial pay period he served at Fort Monmouth.

Restoration Of Annual Leave Under 5 U.S.C. § 6304(d)

It appears that the Department of the Army improperly restored annual leave to Mr. Mitchell. His Corrected Leave Records which represent a reconstruction of his leave accounts incident to the buy back shows that he had a total of 309 hours of leave, subject to forfeiture under 5 U.S.C. § 6304(a) (1976) (60 hours for 1974, and 162 hours for 1975, and 87 hours for 1976). That section provides, with certain exceptions, that an employee may not carry over more than 30 days or 240 hours of accumulated annual leave into the next leave year. Annual leave in excess of this limitation is forfeited. The agency has restored the forfeited annual leave pursuant to 5 U.S.C. § 6304(d)(1). Annual leave forfeited under section 6304(a) may be restored when it was lost due to administrative error or when leave properly scheduled in advance can not be taken due to exigencies of the public business or sickness of the employee.

The 87 hours of annual leave restored to Mr. Mitchell for the 1976 leave year was leave that had been recredited to him incident to the buy back. The Corrected Leave Records show that as of the pay period ending November 20, 1976, he had used 48 hours of annual leave during the leave year and that his annual leave balance was 347 hours. However, his biweekly Leave and Earnings Statement, DA Form 2790, show that as of the same pay period, he had used 209 hours of annual leave and that his annual leave balance was 215 hours.

Leave which is recredited under buy back is leave which the employee had used, and therefore such leave cannot be

restored under 5 U.S.C. § 6304(d). Thus, annual leave reinstated as a result of a buy back of leave, which is in excess of the maximum permissible carryover is subject to forfeiture under 5 U.S.C. § 6304(a). See Matter of Helen Wakus, B-184008, March 7, 1977.

Accordingly, the action of the agency to restore annual leave under 5 U.S.C. § 6304(d) for the 1976 leave year was improper. In addition, where the agency's records show that the annual leave restored to Mr. Mitchell for the prior leave years had been used by him and then recredited as a result of buy back, such annual leave would be required to be forfeited. If Mr. Mitchell has been allowed to take such restored leave his leave account should be adjusted to show a charge to his regular annual leave rather than to the erroneously established special leave account. We would not object to Mr. Mitchell being placed on annual leave so as to avoid forfeiture of annual leave in leave years 1974 through 1976; however, that portion of the employee's compensation covered by that leave would have to be refunded to the Department of Labor. See Matter of Betty J. Anderson, B-182608, August 9, 1977.

Waiver Of Use Of Leave

Mr. Mitchell has requested that we waive his use of 204 hours of leave which the agency had advised him would be forfeited if not used. We know of no authority under which the use of leave by an employee may be cancelled after the fact so that days on which an employee was not working may be treated as work time.

The waiver statute, 5 U.S.C. § 5584 (1976), has limited application. It provides that a claim of the United States against an employee arising out of an erroneous payment of pay or allowances may be waived, in whole or in part, by the Comptroller General of the United States or by the head of the agency. When an employee uses leave which has been erroneously credited waiver may be considered only when the correction of the employee's leave account results in a negative leave balance. Otherwise, there is no overpayment which may be considered for waiver since the error may be corrected by reduction of the employee's positive leave balance. See Matter of Lamoyne J. DeLille, 56 Comp. Gen. 824 (1977).

Cancellation Of Buy Back Of Leave

Mr. Mitchell says that the Department of the Army did not counsel him properly with regard to his election to buy back his leave as he was not fully advised of the consequences of buy back.

Section 8145 of title 5, United States Code, provides that the Secretary of Labor, or his designee shall administer and decide all questions arising under the Act. Thus, any question with regard to the cancellation of all or part of the buy back of leave should be directed to the Department of Labor.

BACKPAY FOR RETROACTIVE PROMOTION

Mr. Mitchell has also submitted a claim for a retroactive promotion and accompanying backpay for the period April 14, to August 29, 1975, as a result of the Department of the Army's alleged failure to award him a proper retroactive promotion and accompanying backpay.

Information furnished by Mr. Mitchell shows that on December 7, 1976, an agency grievance examiner held that the agency had improperly denied his consideration for promotion to the position of Supervisory General Engineer, GS-801-14, at the Picatiny Arsenal. The grievance examiner held that in not considering him for promotion, the agency had violated nondiscretionary agency policies. Furthermore, the grievance examiner held that if the agency had not failed to carry out the nondiscretionary agency policies, Mr. Mitchell would have been promoted to the grade GS-14 position at the Picatiny Arsenal as early as August 29, 1975. Accordingly, the grievance examiner held that he should be awarded a promotion retroactive to August 29, 1975, with accompanying backpay. The Army implemented such action.

Mr. Mitchell contends that the unjustified or unwarranted personnel action first occurred as of April 14, 1975. There is nothing in the record before our Office which shows that Mr. Mitchell would have been promoted prior to August 29, 1975. The only evidence submitted by him is a memorandum dated July 10, 1975, signed by a Kay Driscoll

which states that another individual's consideration for an engineer position, not specified in the memorandum, may have kept Mr. Mitchell from being referred as a candidate for a vacancy. The memorandum recommends his referral as a "Priority Candidate." However there is no evidence in the file to support a determination that Mr. Mitchell would have been promoted prior to August 29, 1975, but for the failure of the agency to implement a nondiscretionary agency policy.

In presenting a claim against the United States the burden is on the claimant to furnish substantial evidence to show liability on the part of the Government. The regulations of this Office require a claimant to support his claim by furnishing acceptable evidence. See 4 C.F.R. § 31.7 (1978).

Since Mr. Mitchell has not provided our Office with any documentation to show that the findings of fact by the grievance examiner were erroneous he has not established any entitlement to a retroactive promotion and backpay prior to August 29, 1975, and his claim may not be allowed.

TRAVEL, PER DIEM INCIDENT TO ILLNESS

Finally, we have for consideration Mr. Mitchell's appeal of the action of our Claims Division which in Certificate of Settlement dated October 4, 1977, denied his claim for additional per diem for the period October 25, 1970, through November 15, 1970, incident to his becoming ill while returning from a temporary duty assignment.

The record shows that by Travel Order No. 64550, dated September 9, 1970, Mr. Mitchell whose permanent duty station was at Fort Monmouth, New Jersey, was authorized travel expenses and per diem beginning October 11, 1970, incident to a temporary duty assignment at Wright-Patterson Air Force Base, Ohio. He was authorized transportation to travel by privately owned automobile at a cost including mileage and per diem not to exceed the cost of travel by common carrier. Allowable travel time was limited as provided in the Joint Travel Regulations.

Upon the completion of his temporary duty assignment at Wright-Patterson Air Force Base, Mr. Mitchell departed

Dayton, Ohio, by privately owned automobile at 4:30 p.m. on Friday, October 23, 1970. The record shows that Mr. Mitchell suffered an intra-ocular hemorrhage on October 24, 1970, and was on sick leave during the period from 5 p.m. on October 24, 1970, through December 8, 1970. He received emergency treatment at St. Francis Hospital in Trenton, New Jersey, at 12:05 a.m. on October 25, 1970. The examining physician in Trenton advised him to return home and to contact another doctor on the following day, Monday, October 26. The record is unclear as to the manner in which Mr. Mitchell traveled from Trenton to the vicinity of his official duty station. On Monday, October 26, at 1:30 p.m. Mr. Mitchell entered Riverview Hospital in Red Bank, New Jersey, which is located approximately 4 miles from Fort Monmouth. Mr. Mitchell was discharged from Riverview Hospital on November 6, 1970. From November 7 through 11, 1970, he states that he stayed at the residence of his sister in Far Rockaway, New York. From November 12 through 15, 1970, he was hospitalized at the New York Eye and Ear Infirmary in New York City.

Paragraph C10101 of the Joint Travel Regulations, Volume 2 in effect when Mr. Mitchell performed his travel provided in pertinent part that when an employee becomes incapacitated during travel status because of illness or injury not due to his misconduct, he is entitled to the per diem allowance for which he is otherwise eligible during the period of his incapacity and return to his permanent duty station.

The Department of the Army has disallowed his claim for additional per diem in connection with his illness on the basis that had he traveled by common carrier he would have been home before his injury occurred. The agency's constructive travel schedule shows that he would have returned home at about 1:45 p.m. on Saturday, October 24, 1970, had he traveled by common carrier. Our Claims Division in its Certificate of Settlement upheld the agency's disallowance of Mr. Mitchell's claim for additional per diem.

However, Mr. Mitchell contends that he was still on a travel status at the time he suffered an intra-ocular hemorrhage. He cites our decision in 39 Comp. Gen. 250 (1959)

in which we considered the extent of allowable travel time, without charge to annual leave, where the employee was authorized travel by privately owned automobile, with reimbursement not to exceed the constructive cost of common carrier in connection with his travel incident to a permanent change of station. We held that the employee's travel time was not limited to the time required by common carrier, but rather was to be based on reasonable driving time.

At the time Mr. Mitchell performed his travel, para. C10156 of the JTR provided in pertinent part as follows with regard to temporary duty travel:

> "C 10156 ALLOWABLE TRAVEL TIME
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> "When travel is by privately owned conveyance, travel time for payroll and leave purposes will be computed as indicated in this paragraph. Charge to leave will be made for excess travel time including any unexplained delays en route. Constructive travel time by common carrier may be obtained from the office paying a claim, when necessary. The amounts charged to leave will be furnished to time and attendance clerks for inclusion on time and attendance reports. Travel time will be allowed as follows:
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> * * * * *
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> "2. constructive scheduled travel time of common carrier used in computing per diem (see par. C 6152), when temporary duty travel by privately owned conveyance is not advantageous to the Government, except for travel under par. C6157."

Paragraph C6152-5 of the JTR provides as follows:

> "LIMITATION ON PER DIEM. The constructive per diem will be limited to the amount otherwise allowable if the traveler had used the carrier upon which constructive transportation costs are determined."

It is noted that the decision 39 Comp. Gen. 250 involved permanent duty travel and that the governing regulations did not contain specific provisions regarding computation of allowable per diem. We have determined that the above provision, para. C10156-2, is within the discretion of the head of the agency concerned and that the limitation on per diem payments provided were appropriate, B-175627, July 5, 1972.

In view of the above regulation, travel performed by Mr. Mitchell subsequent to the time of his constructive scheduled return by common carrier, 1:45 p.m. on October 24, 1970, would not be considered to be time in official travel for which per diem would be payable. Accordingly, he cannot be considered to have been on travel status at the time of his illness and thus he is not entitled to the payment of additional per diem pursuant to para. C10101 of the JTR.

In accordance with the above, the action of our Claims Division which disallowed Mr. Mitchell's claim for additional per diem is sustained.

R. F. Keller

Deputy Comptroller General
of the United States