

Fourth Edition 1996

**Civilian  
Personnel Law  
Manual**

**Title II—Leave**

# Foreword

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This is Title II of the Fourth Edition of the Civilian Personnel Law Manual. The Manual is prepared by the Office of General Counsel, U.S. General Accounting Office (GAO). The purpose of the Manual is to present the legal entitlements of federal employees, including an overview of the statutes and regulations which give rise to those entitlements, in the following areas: Title I—Compensation, Title II—Leave, Title III—Travel, and Title IV—Relocation.

We have included with Title I an “Introduction” in two parts. Part I examines GAO’s authority to issue decisions and settle claims and includes a discussion of a variety of issues on jurisdictional limitations and policy considerations. Part II explains the availability of pertinent research materials and facilities of the General Accounting Office.

This edition of the Civilian Personnel Law Manual is being published in loose-leaf style with the introduction and four titles separately wrapped. The Manual generally incorporates GAO decisions issued through September 30, 1994. The material in the Manual is, of course, subject to revision by statute or through the decision-making process. Accordingly, this Manual should be considered as a general guide only and should not be considered as an independent source of legal authority. This Manual supersedes the Third Edition of the Civilian Personnel Law Manual.

The Federal Personnel Manual (FPM) issued by the Office of Personnel Management is referred to in various places in the Civilian Personnel Law Manual. Effective December 31, 1993, the FPM was abolished. However, an FPM Sunset Document, dated December 31, 1993, identifies FPM material in effect through December 31, 1994. The Sunset Document states that subsequent to December 31, 1994, the retained material will either be issued as process manuals, delegated to agencies, or incorporated in regulations.

Pursuant to section 211 of the Legislative Branch Appropriations Act of 1996, Public Law 104-53, effective June 30, 1996, the GAO’s function of settling claims of federal employees for compensation and leave under 31 U.S.C. § 3702 has been transferred to the Office of Personnel Management (OPM). The related authority under 31 U.S.C. § 3529 to render decisions concerning these matters has been transferred to the head of OPM by the General Accounting Office Act of 1996, Public Law 104-316, effective October 19, 1996. Accordingly, all future claims settlements and related decisions will be made by OPM. For more information, see the Introduction placed with Title I of this Manual.

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**Foreword**

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As always, we would welcome any comments that you may have regarding any aspect of the Manual.

*Robert P. Murphy*

Robert P. Murphy  
General Counsel

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## Abbreviations

AID	Agency for International Development
ASCS	Agricultural Stabilization and Conservation Service
AWOL	absent without leave
Canal Zone	former Panama Canal Zone
C.F.R.	Code of Federal Regulations
ch.	chapter

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Comp. Gen.	Decisions of the Comptroller General of the United States (published volumes)
CPLM	Civilian Personnel Law Manual
CSC	former Civil Service Commission
DMA	Defense Mapping Agency
FAA	Federal Aviation Administration
FPM	Federal Personnel Manual
GAO	General Accounting Office
GAO	(in a citation) General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agency
IRS	Internal Revenue Service
LWOP	leave without pay
MSPB	Merit Systems Protection Board
MSTS	Military Sea Transportation Service
OPM	Office of Personnel Management
para.	paragraph
paras.	paragraphs
PCS	permanent change of station
PDY	permanent duty
PHS	Public Health Service
POV	privately owned vehicle
Pub. L. No.	Public Law
RIF	reduction in force
SES	Senior Executive Service
Stat.	Statutes at Large
Supp.	supplement
TDRL	Temporary Disability Retired List
TDY	temporary duty
U.S.C.	United States Code
VA	Veterans Administration (now Department of Veterans Affairs)
WAE	when actually employed
§	section
§§	sections

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# General Provisions

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## A. Coverage

The Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. §§ 6301-6387, applies to the following individuals:

(1) an employee of the federal government as defined by 5 U.S.C. § 2105, and;

(2) an individual employed by the government of the District of Columbia before October 1, 1987.

However, there are certain employees excluded from coverage by 5 U.S.C. § 6301(2). A list of the employees excluded from the act also may be found in FPM Supp. 990-2, Book 630, S2-1.

An appointee who has not actually entered on duty is not an "employee" as defined in 5 U.S.C. § 2105 and, therefore, is not entitled to military leave under 5 U.S.C. § 6323. B-205972, May 25, 1982.

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## B. Employees Covered

### 1. Type of appointment

#### a. Temporary employees

Service of temporary and indefinite employees of the Federal Deposit Insurance Corporation is considered comparable to service creditable under 5 U.S.C. § 8332 and may be credited for annual leave purposes. 35 Comp. Gen. 1 (1955).

An employee of the Department of the Army, who served three consecutive appointments of less than 90 days each without a break in service, is entitled to annual leave under 5 U.S.C. § 6303(b) for each full biweekly pay period she was employed. B-190005, October 6, 1977.

#### b. Intermittent employees

When a regular tour of duty is established for intermittent employees by preparation of a monthly work schedule 3 weeks in advance, such employees are covered by 5 U.S.C. §§ 6301-6312. However, the regular tour of duty requirement is not met when employees are not scheduled to perform duties during each week of a pay period and the benefits of the Leave Act are not available to such employees. 32 Comp. Gen. 206 (1952).

An employee whose position was designated "intermittent" is nonetheless entitled to annual leave benefits since he had an established regular tour of duty for each of the 2 workweeks in a biweekly pay period even though he may not have been scheduled to work at the same time and on corresponding days of the 2 workweeks of that pay period. 57 Comp. Gen. 82 (1977).

The fact that an employee's appointment was designated "intermittent" does not determine his entitlement to annual leave benefits if, in fact, he works regularly scheduled tours of duty. 57 Comp. Gen. 82 (1977); and B-183813, June 20, 1975.

An employee seeks reconsideration of a prior decision on his claim that held that the employee, hired as an intermittent United States deputy marshal, was not entitled to leave benefits because the findings contained in his agency's report supported the determination that he was not assigned regularly scheduled tours of duty. Evidence that he frequently reported to work at 8:30 a.m. sometimes at the request of his supervisor, that he performed a variety of duties, and that he often worked 78 hours in a pay period is not sufficient to refute those findings. The prior decision, B-236228, December 22, 1989, is affirmed. Maynard W. Thompson, B-236228.2, April 16, 1991.

c. WAE employees

Employees, appointed on a when-actually-employed basis, worked regularly scheduled tours of duty of 80 hours each pay period during their period of employment. Therefore, they are entitled to annual and sick leave accrual and pay for holidays that occurred during their tours of duty. B-183813, June 20, 1975.

d. Part-time employees

A part-time employee is entitled to benefits under the Annual and Sick Leave Act only if he serves under an established tour of duty for each of the 2 administrative workweeks in each biweekly pay period. 32 Comp. Gen. 490 (1953) and 31 Comp. Gen. 581 (1952).

e. Consultant

An individual consultant whose services were procured under a contract which established an employer-employee relationship with the government rather than an independent contractor relationship, is entitled to accrual of annual and sick leave, where it appears he had a regularly scheduled tour of duty. In addition, the consultant is entitled to compensation for holidays on which he did not perform any work since his contract contained an express provision to that effect. Lynn Francis Jones, 63 Comp. Gen. 507 (1984).

2. Specific categories of employees

a. Agricultural marketing agents

Employees of the Department of Agriculture at various milk markets, whose salaries are paid from funds established by assessments upon milk handlers, are entitled to accrual of leave. B-109025, June 23, 1952.

b. Employees of cooperating agency

Personnel employed and paid pursuant to cooperative agreements between the United States and a cooperating agency, such as a state or other political subdivision, are employees of the United States and are subject to federal laws controlling the rights and benefits of federal personnel including leave entitlement so long as their duties and time of work are supervised and controlled by federal officers. B-139050, June 2, 1959.

c. Public Health Service commissioned personnel

Commissioned personnel of the Public Health Service are considered civilian officers and employees under 5 U.S.C. § 6308 so that members transferring between the commissioned corps and other civilian positions are not entitled to lump-sum leave payment but may have annual and sick leave transferred on adjusted basis. 34 Comp. Gen. 287 (1954).

d. Law clerks to federal judges

Claims for payment for annual leave from law clerks or secretaries may be paid if a certificate is furnished from the judge showing that a regular tour of duty was worked weekly by the employees, that all absences were charged to leave, and the amount of leave on the date of separation.

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Similar criteria should be used to determine whether employees could be granted leave where no separation is involved. B-86699, June 14, 1949, and July 20, 1949.

e. Maritime employees

Although civilian personnel serving on ships of the MSTs have their wages fixed in accordance with prevailing rates and practices of the maritime industry, such employees are not exempted from the provisions of 5 U.S.C. §§ 6301-6312. 43 Comp. Gen. 661 (1964).

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C. Employees Excluded

1. Type of appointment

a. Contract employees

Leave is governed by statute and not by the terms of a contract. B-61290, November 15, 1946.

b. Contractors

Contractors are not regarded as employees of the United States if engaged on other than a personal service basis and are, thus, excluded from leave laws. 23 Comp. Gen. 425 (1943).

c. Experts and consultants

Experts and consultants without a regular tour of duty are excluded from leave benefits under 5 U.S.C. §§ 6301-6312. 35 Comp. Gen. 638 (1956). An expert appointed on an intermittent basis is not entitled to leave even though he actually worked full time since he did not have an established regular tour of duty. 58 Comp. Gen. 167 (1978).

d. Temporary employees

Construction tradesmen, recruited from a local work force under temporary appointments at hourly rates to perform alterations at the Grand Coulee Power Plant, worked side by side with regular maintenance employees, and the total crew performed a mixture of construction and maintenance work. The regular workers received maintenance wages and the temporary construction workers received construction wages. However, the construction workers are not entitled to leave benefits under

5 U.S.C. §§ 6301-6312, since they are specifically excepted from coverage as “temporary employees engaged on construction work at hourly rates” by 5 U.S.C. § 6301(2)(iii). B-160391, December 21, 1966.

e. Intermittent employees

The National Gallery of Art employed four nurses who worked every third weekend, and an occasional day each administrative workweek. One nurse also worked as relief nurse and another worked part-time summer evenings. Since they had no regularly scheduled tour of duty in each administrative workweek they were not entitled to accrue annual and sick leave by virtue of 5 U.S.C. § 6301(2)(ii), which excludes part-time employees who do not have regularly scheduled tours of duty. B-111206, November 24, 1971.

Commissary cashiers who were employed on an intermittent basis received tentative work schedules each week which were subject to change. Such schedule does not constitute an administratively prescribed regular tour of duty so as to entitle these employees to leave benefits. B-191915, September 29, 1978.

f. Fee compensated persons

Persons compensated on a fee basis are not to be considered officers and employees of the United States and, therefore, are not covered by 5 U.S.C. §§ 6301-6312. 30 Comp. Gen. 406 (1951).

g. “Officers”

The term “officers” as used in 5 U.S.C. § 6301(2)(xi) applies only to persons who are required to be appointed by the President with or without confirmation by the Senate, and, therefore, CSC, acting under delegation of the President’s authority, contained in Executive Order No. 10540, June 29, 1954, may designate for exemption from the Leave Act only those persons who are presidential appointees. B-123698, June 22, 1955, affirmed, B-123698, May 10, 1978.

h. De facto employees

Generally, a de facto employee does not accrue leave. 31 Comp. Gen. 262 (1952). See also 57 Comp. Gen. 406 (1978); and B-191397, September 6, 1978.

i. Erroneous appointment exception

However, in Valdez we held that where a person has been appointed to a position by an agency and the appointment is subsequently found to have been improper or erroneous, the employee is entitled to accrual of annual leave and lump-sum payment for unused leave upon separation, unless (1) the appointment was made in violation of an absolute statutory prohibition or (2) the employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter. Prior inconsistent decisions will no longer be followed. This new rule does not apply to persons who have never been appointed or who serve after their appointments have expired since those persons do not satisfy the definition of "employee" in 5 U.S.C. § 2105. Victor M. Valdez, Jr., 58 Comp. Gen. 734 (1979). See also Sidney P. Arnett and Mary Ann Barron, B-220791, September 8, 1986; Thomas C. Collins, 61 Comp. Gen. 127 (1981).

2. Specific categories of employees

a. Certain United States attorneys

Four United States attorneys who are compensated at rates in the Executive Schedule are excluded from coverage under the annual and sick leave provisions of 5 U.S.C. §§ 6301-6312. Although United States attorneys generally are not excluded from leave benefits (section 6301(2)(xi)), certain United States attorneys whose pay is set at level IV of the Executive Schedule are excluded from leave benefits under section 6301(2)(x) which excludes officers whose basic rates of pay exceed the highest General Schedule level. 53 Comp. Gen. 577 (1974).

b. Court reporters

Court reporters paid an annual salary to be on call as needed by the court, but who are otherwise free to augment income with earnings from transcript fees do not have regular tours of duty consisting of a definite time, day, and/or hour which they are required to work during the workweek. Thus, they are part-time employees excluded from annual leave entitlement by 5 U.S.C. § 6301(2)(ii). While a court reporter-secretary may be entitled to annual leave for the secretarial portion of duties performed during a regular tour of duty, the record contains no certification of leave earnings and use upon which to base a lump-sum leave payment. 54 Comp. Gen. 251 (1974).



c. Governors, commissioners, and appointees

Governors and high commissioners of United States Territories are exempted from leave benefits of 5 U.S.C. §§ 6301-6312. B-127205, May 9, 1956.

d. Joint United States-foreign government employees

Joint United States-foreign government employees, who devote no particular period of their employment to the work of either government, are not officers and employees of the United States so as to be entitled to leave benefits under 5 U.S.C. §§ 6301-6312. 24 Comp. Gen. 384 (1944).

e. Maritime Service enrollees on active administrative duty

Although enrollees (administrative) of U.S. Maritime Service are not expressly exempted from 5 U.S.C. §§ 6301-6312, they are not subject to its provisions, and a leave system may be properly established by regulations prescribed by the Administrator of the Maritime Administration. B-117518, November 20, 1953.

f. Nonappropriated fund employees

Nonappropriated fund employees of the Army and Air Force Motion Picture Service are not covered by 5 U.S.C. §§ 6301-6312, and, thus, they are not entitled to service credit for annual leave accrual on subsequent employment in a department or agency of the executive branch. 37 Comp. Gen. 671 (1958).

g. Federal Reserve Bank employees

Employees of Federal Reserve Bank are not employees of the United States and are not entitled to benefits under 5 U.S.C. §§ 6301-6312. B-53989, December 10, 1945.

h. Employees of Radio Free Europe

Although section 2313 of the Foreign Service Act of 1980 amended 5 U.S.C. § 8332 to allow civil service retirement credit for employment with Radio Free Europe (thus affecting leave accrual categories), this law does not entitle an employee of Radio Free Europe to leave benefits under 5 U.S.C. §§ 6301-6312. 61 Comp. Gen. 279 (1982).

i. Executive Officer of the D.C. Courts

The Executive Officer of the District of Columbia (D.C.) Courts is entitled to the leave benefits of the D.C. judges as well as the compensation and retirement benefits which are specifically provided by statute. Since the Executive Officer of the D.C. Courts is no longer subject to the Annual and Sick Leave Act, 5 U.S.C. §§ 6301-6312, the leave entitlement of the Executive Officer is subject to administrative determination by the District of Columbia Courts. Due to legislative changes, 52 Comp. Gen. 111 (1972) will no longer be followed. Larry P. Polansky, B-217270, October 28, 1985.

j. Armed forces members detailed under Foreign Assistance Act

Members of the armed forces assigned to perform functions outside the United States under the Foreign Assistance Act of 1961, 22 U.S.C. § 2385(d), which authorized compensation, allowances, and benefits to assigned personnel at the rates provided for the Foreign Service Reserve and staff by the Foreign Service Act of 1946, as amended, 22 U.S.C. §§ 3901, 3962, and 3963, are paid in accordance with section 625(d)(1) of the 1961 Act, 22 U.S.C. § 2385(d)(1). Therefore, although commissioned personnel of the United States Coast Guard assigned to programs under the Foreign Assistance Act may only receive the compensation, allowances, and benefits prescribed for the Foreign Service Reserve and staff, 42 Comp. Gen. 296 (1962), since they continue their status in the active service of the armed forces during their assignment, they continue to be entitled to their leave benefits as armed forces members. 43 Comp. Gen. 119 (1963).

# Annual Leave

## A. Laws and Regulations

The laws and regulations governing annual leave are contained in 5 U.S.C. §§ 6301-6312 and 5 C.F.R. Part 630.

### 1. Definitions

#### a. Accrued leave

The leave earned by an employee during the current leave year that is unused at any given time in that year. 5 C.F.R. § 630.201(b)(1). See also 27 Comp. Gen. 373, 376 (1948).

#### b. Accumulated leave

The unused leave remaining to the credit of an employee at the beginning of a leave year. 5 C.F.R. § 630.201(b)(2).

#### c. Leave year

The period beginning with the first day of the first complete pay period in a calendar year and ending with the day immediately before the first day of the first complete pay period in the following calendar year. 5 C.F.R. § 630.201(b)(6).

#### d. Days of leave

The days on which the employee would otherwise work and receive pay and do not include holidays and nonworkdays established by federal statute, executive order, or administrative order. 5 U.S.C. § 6302(a).

#### e. Full biweekly pay period

For the purposes of the statutes governing leave, an employee is deemed employed for a full biweekly pay period if he is employed during the days within that period, exclusive of holidays and nonworkdays established by federal statute, executive order, or administrative order, which fall within his basic administrative workweek. 5 U.S.C. § 6302(b).

### 2. Rate of compensation

Compensation during annual leave is payable at the regular rate paid for the position occupied by the employee when the leave is taken; there is no authority to fix a rate of compensation during annual leave differing from

the rate regularly fixed for active service during a regular tour in the position. 27 Comp. Gen. 92 (1947).

## B. Accrual

### 1. Rate of accrual

#### a. Full-time employees

Under 5 U.S.C. § 6303(a) annual leave accrues at the following rates:

- employees with less than 3 years of service—1/2 day (4 hours) for each full biweekly pay period, or 13 days per year;
- employees with between 3 and 15 years of service—3/4 day (6 hours) for each full biweekly pay period, except for the last full biweekly pay period in the year which shall be 1-1/4 days (10 hours), or 20 days per year;
- employees with 15 or more years of service—1 day (8 hours) for each full biweekly pay period, or 26 days per year.

#### b. Part-time employees

Under 5 C.F.R. § 630.303, a part-time employee for whom there has been established in advance a regular tour of duty on 1 or more days during each administrative workweek, and a part-time employee on a flexible work-schedule with an established biweekly work requirement, accrues annual leave at the following rates:

- employees with less than 3 years of service—1 hour for each 20 hours in a pay status;
- employees with between 3 and 15 years of service—1 hour for each 13 hours in a pay status;
- employees with 15 or more years of service—1 hour for each 10 hours in a pay status.

### 2. Pay period requirement

#### a. Biweekly pay period

To earn leave, an employee must be employed during a full biweekly pay period and, if he enters on duty in the middle of the pay period, he is not entitled to any credit for annual leave for that pay period. 31 Comp. Gen. 581, 586 (1952); and B-112731, December 4, 1952. 5 C.F.R. § 630.202.

b. Pay period other than biweekly

An employee paid on other than a biweekly pay period basis earns leave on a pro rata basis for a full pay period. 5 C.F.R. § 630.203.

c. Nonpay status during pay period

When an employee's service is interrupted by a non-leave-earning period (nonpay status), he earns leave on a pro rata basis for that portion of the pay period in which he was in a paid status. 5 C.F.R. § 630.204. See also 32 Comp. Gen. 310, 313 (1953).

An employee who suffered a work-related injury was in a leave-without-pay status while receiving compensation under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8151. While the employee's intermittent service is interrupted by a non-leave-earning period, he earns leave only on a pro rata basis for that portion of a pay period in which he was in a pay status. B-180010.12, March 8, 1979.

d. Effective date of change in accrual rate

Any change in the rate of annual leave accrual shall take effect at the beginning of the next pay period (or corresponding period for employees not paid on a biweekly basis) after the pay period in which the employee completed the prescribed period of service. 5 U.S.C. § 6303(c).

3. During suspension or separation

a. Suspension for security reasons

An employee who is suspended for security reasons under 5 U.S.C. § 7532, but who is later reinstated, is entitled to accrue annual leave for the period of suspension, subject to the maximum accrual limitation. 39 Comp. Gen. 52 (1959) and 35 Comp. Gen. 121 (1955).

b. Veterans reemployment right

A veteran who is erroneously prevented from restoration to his civilian job is entitled to accrual of leave for the intervening period. B-127901, August 1, 1956.

c. While receiving disability compensation

An employee who is receiving disability compensation for a work-related illness or injury does not accrue annual leave for the period covered by such compensation. 29 Comp. Gen. 73 (1949); B-180010.12, March 8, 1979; and B-164617, April 13, 1972.

d. Park Police during injury-related absence

When a Park Police officer is absent from duty due to injury or illness resulting from the performance of duty and he is not charged leave pursuant to 5 U.S.C. § 6324, he remains in a pay status during such absence, and continues to accrue sick and annual leave. B-182608, February 19, 1976.

e. Violation of Equal Employment Opportunity Act of 1972

A U.S. district court found that an employee had been removed from his position with the Defense Mapping Agency (DMA) in violation of the Equal Employment Opportunity Act of 1972 and ordered the DMA to reinstate the employee with backpay. As a part of that award the employee is entitled to restoration of the annual leave and the sick leave he would have earned during the period of his discriminatory separation as an element of backpay. Francis J. Pinkney III, B-213604, May 15, 1984.

f. Forfeiture of leave

Federal employees are generally eligible to carry over no more than 240 hours of unused annual leave from 1 year to the next. An employee who has been suspended from duty without pay, and who cannot use annual leave, is subject to this maximum leave carryover limitation. Thus, an employee who was suspended and was not restored to duty until the next succeeding year forfeited the number of hours of annual leave in excess of 240 hours which were credited to his leave account at the time the suspension began. B-219974, October 21, 1985.

4. Maximum accumulation

a. Generally

Under 5 U.S.C. § 6304(a), an employee may accumulate a maximum of 30 days, or 240 hours. The limitation is imposed at the beginning of the first full biweekly pay period (or corresponding period for an employee not

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paid biweekly) occurring in a year. Any excess accrued annual leave will be forfeited at that time. See 31 Comp. Gen. 581 (1952). See also this chapter, "G. Restoration of Leave."

b. Employees stationed outside of the United States

Employees stationed outside of the United States who meet the conditions for eligibility established by 5 U.S.C. § 6304(b) and 5 C.F.R. § 630.302 may accumulate 45 days (360 hours) of annual leave.

c. Employed and hired locally

An employee, who entered service in the Canal Zone and was given a transportation agreement on the basis of his travel to the Zone as a dependent of an employee with a transportation agreement, is not entitled to accumulate 45 days annual leave and home leave since he did not meet the requirement of 5 U.S.C. § 6304(b) that he be recruited from the United States or a territory or possession of the United States outside the Zone. However, he is entitled to such benefits upon transfer to Mexico since the Zone is considered within the phrase "territories and possessions" of the United States as used in 5 U.S.C. § 6304(b)(1). 53 Comp. Gen. 1966 (1974). But see 59 Comp. Gen. 671 (1980) regarding the changed status of the Canal Zone.

d. Significance of employee's permanent residence

A postal inspector recruited in Puerto Rico and trained and employed in the United States for 2 years, and then transferred to Puerto Rico, was not under the 45-day ceiling since there was no indication that he changed his permanent residence to the United States where he would be expected to take his home leave. 48 Comp. Gen. 437 (1968).

e. Reemployment following separation

An employee, who had a 45-day leave ceiling through service overseas, separated from federal service in 1966. Upon reemployment in 1969 the employee was limited to 30-day leave ceiling since he "used" his annual leave when he received lump-sum payment for annual leave upon separation. 59 Comp. Gen. 352 (1980).

f. Adjustment following return from overseas post

An employee's annual leave ceiling was not adjusted on his Statement of Earnings and Leave when it was reduced after he returned to the United States from an overseas duty post. Absent an agency regulation requiring annual leave ceilings to be included on earnings statements or requiring annual leave ceilings to be adjusted immediately upon departure from an overseas post, the failure to show the correct annual leave ceiling does not constitute administrative error providing a basis for restoration of leave under 5 U.S.C. § 6304(d)(1)(A). B-200855, March 26, 1981.

g. Senior Executive Service

Under the provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1224, annual leave accrued by an individual while serving in a position in the Senior Executive Service shall not be subject to the limitation on maximum accumulation contained in 5 U.S.C. § 6304(a). See 5 U.S.C. § 6304(f), for this and other exceptions.

h. Part-time employees

Part-time employees operate under the same 30-day or 45-day ceilings as apply to full-time employees. 5 C.F.R. § 630.304.

C. Creditable Services

1. Generally

In determining years of service, all service of a type that would be creditable under section 8332, regardless of whether an employee is covered by Subchapter III, Chapter 83, is creditable for setting leave earning rates. An employee who is a retired member of a uniformed service is entitled to credit for the active military service only under certain conditions. 5 U.S.C. § 6303(a).

Office of Personnel Management's interpretation in former Federal Personnel Manual Supplement 296-33 of the language in 5 U.S.C. § 6303(a)(3)(B) (1988) which gives credit for prior military service in computing an employee's entitlement to annual leave is not unreasonable in distinguishing between service "during" a war and service "in" a campaign or expedition. Although OPM's definition is different than that in 38 U.S.C. § 101 (1988), which concerns veteran's benefits, OPM has the statutory authority to administer the leave system and its determination



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will not be disturbed by GAO. Kenneth J. Emanuel, Esq., B-251775, April 29, 1993.

2. Potentially creditable service

Service which is potentially creditable for retirement purposes such as (1) service for which retirement deductions were withdrawn and not repaid, (2) service not under the retirement act, (3) service where the employee is receiving an annuity under another retirement system, (4) military service on the basis of which an employee is receiving retired pay, and (5) military service which was not an interruption of civilian service and where the employee does not have 5 years of civilian service, is creditable for setting leave earning rates. 31 Comp. Gen. 215 (1951).

3. Military retiree

Military retiree who claims credit for all of his active military service during the Vietnam conflict for the purpose of annual leave accrual as a civilian employee is only entitled to service credit in accord with the Office of Personnel Management's interpretation of the leave statute. That interpretation allows credit for annual leave accrual purposes only for that active military service performed during a war or in the area of a campaign or expedition for which a campaign badge has been authorized. Since the Vietnam conflict is not a war for this purpose, only the retiree's active service spent in the area of the Vietnam campaign or expedition is creditable service. David T. Simrak, B-213727.2, June 2, 1987.

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D. Noncreditable Services

1. Leave-without-pay status

An employee in leave-without-pay status, performing active duty for training, may not be credited with annual leave that would have accrued from that period of military duty. Ronald E. Ferguson, B-215542, August 1, 1985.

2. Radio Free Europe employees

Under the provisions of section 2313 of the Foreign Service Act of 1980, 5 U.S.C. § 8332 was amended effective February 15, 1981, to allow civil service retirement credit for employment with Radio Free Europe. Thus, an employee's leave accrual category would be adjusted on the effective

date of the act to credit service with Radio Free Europe. 61 Comp. Gen. 279 (1982).

3. Service governed by other than 5 U.S.C. § 8332

All service creditable under 5 U.S.C. § 8332 for annuity purposes under the act, even though not regarded as military or government service, may be used in determining years of service for leave accrual purposes unless excluded under other provisions of law. Therefore, the service specified in 5 U.S.C. § 8332(b)(1) through (8) is creditable, but employment not otherwise creditable for leave accrual purposes is not made creditable solely because it may be creditable for retirement purposes. 51 Comp. Gen. 301 (1971). In the same manner, service with Howard University, which is not creditable service under 5 U.S.C. § 8332, is not federal civilian service for leave accrual purposes. 50 Comp. Gen. 820 (1971).

4. Employee on temporary disability retired list

A service member who received an appointment as a civilian employee during the time his name was on the Temporary Disability Retired List (TDRL) is considered a "retired member of a uniformed service" under 5 U.S.C. § 6303(a) and is, therefore, not entitled to credit for annual leave purposes for his active military service since his disability does not meet the criteria of 5 U.S.C. § 6303(a)(A)(i) or (ii) nor does his service time qualify under 5 U.S.C. § 6303(a)(B) or (C). Such service may be credited only if his name is removed from the TDRL by virtue of his separation with severance pay. In that event his service may be credited as of the date his name is removed from the TDRL. Daniel F. Cejka, 63 Comp. Gen. 210 (1984).

5. Upon reemployment—military service credit

Service in the Philippine Commonwealth Army is not active military service that is creditable for the purpose of determining an employee's annual leave accrual rate. Lucio R. Gallardo, B-226020, October 23, 1987.

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## E. Transfers and Reemployment

### 1. Transfers

#### a. Between positions under 5 U.S.C. §§ 6301-6312

An employee who transfers between positions covered by 5 U.S.C. §§ 6301-6312, without a break in service, shall have his leave certified to the employing agency for credit or charge. 5 C.F.R. § 630.501(a).

#### b. Between permanent and temporary positions

An employee who was voluntarily furloughed from a permanent position so as to accept a temporary appointment with a temporary commission and who resumed duties in the permanent position without a break in service, may have the annual leave he accrued in the temporary position transferred to his credit in the permanent position. 33 Comp. Gen. 528 (1954).

#### c. Reemployed annuitant

An employee retired on December 31 and accepted a temporary appointment beginning January 1 of the following year. His accumulated and accrued leave should be transferred to his new position. 55 Comp. Gen. 784 (1976); and B-106065, October 24, 1951.

#### d. Between different leave systems

Under 5 U.S.C. § 6308 an employee who transfers between positions under different leave systems without a break in service shall have his leave credited to his new position on an adjusted basis as set forth under CSC regulations. See 5 C.F.R. § 630.501(b). An employee may transfer all accumulated and currently accrued annual leave to his credit as of the date of transfer, and the aggregate amount of such leave, but not in excess of the maximum limitation allowable under the former leave system, shall constitute his new leave ceiling until reduced under 5 U.S.C. § 6304(c). 48 Comp. Gen. 212 (1968). See also 49 Comp. Gen. 189 (1969).

#### e. To position not under 5 U.S.C. §§ 6301-6312

Employees who resigned from federal employment and accepted employment with federally funded Legal Services Corporation may be paid lump-sum payments for annual leave and may have sick leave balances certified for retirement purposes or for possible recredit since by statute

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employees of Legal Services Corporation are not federal employees for leave purposes. B-186449, January 24, 1977. See also Chapter 3, "Lump-Sum Leave Payments."

## 2. Reemployment

### a. Generally

For employees who have received a lump-sum payment upon separation and are reemployed before the end of the period covered by the lump-sum payment in the federal service, see 5 U.S.C. § 6306. See also, Chapter 3, "Lump-Sum Leave Payments."

### b. After military service

An employee who leaves his civilian position to enter the military service and elects under 5 U.S.C. § 5552 to have his leave remain to his credit shall have his leave restored in accordance with his right of restoration to his civilian position or upon reemployment in a position covered under 5 U.S.C. §§ 6301-6312, not more than 3 years after separation from active military duty. 5 C.F.R. § 630.504.

An employee who retired after 20 years of military service and was employed in a federal civilian agency in 1976 is not entitled to a recredit of the leave he alleges was available at the time he left his former civilian employment and entered military service in 1955. In the absence of official records or corroborating evidence, the employee's estimate alone is insufficient to certify a prior leave balance upon reemployment in a civilian position. John H. Adams, B-209769, March 28, 1983.

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## F. Administration of Annual Leave

### 1. Generally

Annual leave is provided and used for two general purposes: (1) to allow every employee an annual vacation period of extended leave for rest and recreation; and (2) to provide periods of time off for personal and emergency purposes such as a death in the family, religious observances, attending to personal business, etc. As provided in 5 U.S.C. § 6302(d) annual leave may be granted at any time during the year as the head of the agency concerned may prescribe. Thus, while the taking of annual leave is an absolute right of the employee, it is subject to the right of the head of the

agency concerned to fix the time at which leave may be taken. 39 Comp. Gen. 611 (1960) and 16 Comp. Gen. 481 (1936).

An employee's annual leave account was overcredited due to agency error as to his service computation date. Where the overcredit of annual leave has occurred in the year in which the error was discovered, since an employee may be advanced annual leave for his use during the year so long as the erroneous leave already credited him has not caused his leave accrual to exceed his maximum entitlement for the year, the overcredit may remain to his credit and be adjusted from proper leave earnings during the balance of the year. Stephen C. Small, B-250228, February 22, 1993.

## 2. Charges to annual leave

### a. Minimum charge

The minimum charge for leave is 1 hour, and additional charges are in multiples thereof, unless an agency establishes or negotiates a different minimum. However, if an employee is unavoidably or necessarily absent or tardy for less than 1 hour the agency, for adequate reason, may excuse him without charge to leave. An employee who is charged for leave for an unauthorized absence or tardiness may not be required to perform work for any part of the leave period charged. 5 C.F.R. § 630.206.

### b. Charges to current, not subsequent, years

Annual leave taken during a calendar year must be charged to leave which accrues during that year or to prior accumulations. 31 Comp. Gen. 581 (1952); and 27 Comp. Gen. 336 (1947). See also this chapter, "F. 3. Advanced leave."

### c. Military duty

Where employees performed military service for 5-day periods and not on weekends, they need not be charged military leave or annual leave for the weekend periods. B-171947, September 7, 1972; and B-149951, November 23, 1962.

d. Holidays and standby duty

X-ray technicians employed by a VA hospital who receive premium pay for standby duty under 5 U.S.C. § 5545(c)(1) and who are absent on holidays which occur within their regular tours of duty should be charged leave for those absences since their duty on holidays was included in determining their premium pay rates. 56 Comp. Gen. 551 (1977), overruling 54 Comp. Gen. 662 (1975). See also B-192815, December 7, 1978. However, such employees may be excused from duty on such holidays without a charge to leave where it has been administratively determined that their services are not required on a particular holiday. 56 Comp. Gen. 551 (1977). This 1977 decision is limited to prospective application, and leave which was credited or paid lump sum under the authority of 54 Comp. Gen. 662 prior to April 19, 1977 (effective date of 56 Comp. Gen. 551), need not be collected. However, if such leave was not recredited or paid prior to April 19, 1977, there is no authority to do so after that date. 58 Comp. Gen. 345 (1979).

VA employee receiving standby premium pay under 5 U.S.C. § 5545(c)(1) was excused from performing regular duties at office on holiday but was required to remain at residence at standby status. Since he was not relieved from duty, he should not be charged annual leave in standby status. B-193709, November 28, 1979, citing 58 Comp. Gen. 345 (1979).

e. Holiday "in lieu of"

The Department of the Army closed the commissary on Saturday before a Monday holiday to avoid the payment of holiday pay to full-time employees on a Tuesday-through-Saturday shift who were entitled to a day "in lieu of" a holiday, under 5 U.S.C. § 6103(b)(2). Since part-time or intermittent employees were not entitled to a day "in lieu of" a holiday, they may be charged annual leave or leave without pay on the Saturday the commissary was closed. B-192104, September 1, 1978.

f. Snow emergency

Although administrative employees of FAA's Indianapolis facility were excused from reporting to duty during snowstorm emergency of January 26, 1978, operational component remained open, staffed by air traffic control personnel who stayed on duty. Since the facility was not closed, the 26th was not a nonworkday for purposes of leave administration, and an air traffic controller absent on approved leave for

that day was properly charged annual leave even though some air traffic controllers scheduled for duty during the day shift were excused without charge to leave. B-194432, October 16, 1980.

g. Foreign holiday

Air Force employees on temporary duty in Saudi Arabia were denied access to work areas for 15-day period because of local Ramadan holiday. Although the employees traveled elsewhere during this period, they are entitled to administrative leave with no charge to annual leave in the same manner as employees who remained in Saudi Arabia. B-199961, July 7, 1982.

h. Nonworkdays

An employee who had exhausted his military leave sought to use annual leave when he was prevented from working overtime on a nonworkday due to a weekend military drill. Annual leave may be used for military training, but there is no authority to grant annual leave for a nonworkday since, under 5 U.S.C. § 6302(a), days of leave for which an employee may receive compensation are exclusive of holidays and nonworkdays. B-188145, November 15, 1977.

i. Effect of time change

Employees, who are working a night shift on the last Sunday in April when daylight saving time begins, may be charged 1 hour of annual leave since they work only 7 hours that shift. Administrative leave may not be granted. B-195779, April 25, 1978. See also Chapter 5 of this title, "A. Administrative Leave."

j. Agency-required physical exam

Where it is an agency policy to grant compensatory time to employees who are required to take a physical examination on a nonworkday, the agency may not otherwise charge the employee annual leave when they report for such an examination. B-159420, July 19, 1966.

k. Charge for excess compensatory time

Where an employee was erroneously granted excess compensatory time off, the excess compensatory time may be considered for waiver under

5 U.S.C. § 5584. If waiver is not allowed, the employee's annual leave balance may be charged for compensatory time erroneously granted, but only with the employee's consent. 58 Comp. Gen. 571 (1979); and B-192839, May 3, 1979. See 59 Comp. Gen. 253 (1980), modifying 58 Comp. Gen. 571 (1979).

l. Erroneous charge to annual leave

An audit of time and leave records of an employee upon retirement revealed an alleged overstatement of 40 hours of annual leave. Where a review of evidence, particularly the time and attendance reports for the period in question, discloses a lack of adequate documentation to clearly show the claimant used 40 hours of annual leave, such leave should be credited to the employee's account. B-186355, November 9, 1977.

m. Injury in performance of duty

U.S. Park Policeman injured in the performance of duty and assigned to light duty for 4 hours a day continues in a pay status for and accrues leave based on a full 8-hour workday under 5 U.S.C. § 6324. When that officer requests a week of annual leave, he should be charged 40 hours rather than 20 hours of annual leave. Section 6324 does not preclude the charging of annual or sick leave for absences unrelated to the injury which occurred in the performance of duty. U.S. Park Police, 66 Comp. Gen. 353 (1987).

n. Relocation of housing after transfer

A transferred employee who was offered government housing for 1 year as an accommodation in a high cost resort area may not be paid the expenses incurred in later moving his household goods locally to a private residence. Such moving expenses may be paid by the agency only where the employee is required to occupy government quarters. Furthermore, the employee may not have restored the 16 hours of annual leave used during the move. Gordon E. Warrington, 68 Comp. Gen. 324 (1989).

3. Advanced leave

a. Return to duty requirement

Where it is known at the time advanced leave is requested that the employee will not be returning to duty, advanced annual leave or sick



leave may not be granted. 25 Comp. Gen. 874 (1946) and 23 Comp. Gen. 837 (1944). Where an employee was reported lost at sea and there was only a remote possibility that he would return to duty, advanced annual leave may not be granted. 48 Comp. Gen. 676 (1969).

Where an agency has a policy not to grant leave until it is earned, an employee on leave need not return for 1 workday prior to retirement in order to use annual leave. The agency may advance him the 8 hours of leave. B-120074, November 29, 1966.

b. Refund for unearned leave

An employee who is indebted for unearned leave must, upon separation, either refund the amount paid him representing the amount of indebtedness or have deducted that amount from any pay due him. An employee who enters active military service with a right of restoration is deemed not separated for the purposes of this provision. Refund is not required when an employee dies, retires for disability, or resigns or is separated because of disability under specified conditions. 5 C.F.R. § 630.209. See also 33 Comp. Gen. 145 (1953); 29 Comp. Gen. 234 (1949); and B-131792, June 14, 1957.

The leave "forgiven" by this provision is not chargeable against subsequently earned leave if the employee is later reemployed. 29 Comp. Gen. 234, supra.

4. Substitution of annual leave

a. For sick leave

(1) Generally—An absence which is otherwise chargeable to sick leave may be charged to annual leave if the employee so requests and the agency agrees. 37 Comp. Gen. 439 (1957); and B-142571, April 20, 1960.

(2) Hospitalization during period of removal—Where an employee was reinstated into federal service after an improper removal, the period the employee was in the hospital during his separation may be charged to annual leave at the discretion of the agency. B-183566, April 16, 1976.

(3) Retroactive substitution—The retroactive substitution of annual leave for sick leave is not authorized absent a law or regulation permitting a change in a statutory right once it has been vested. 38 Comp. Gen. 354

(1958). An exception to this policy exists for the liquidation of advanced sick leave. See 37 Comp. Gen. 439 (1957).

(4) To avoid forfeiture of annual leave—Generally, a substitution of annual leave for sick leave may not be made retroactively solely for the purpose of avoiding a forfeiture of annual leave at the end of the leave year. 38 Comp. Gen. 354 (1958); 31 Comp. Gen. 524 (1952); and B-183566, April 16, 1976.

An employee who was on sick leave from September 1971 until March 1972 requested the substitution of 18 hours of annual leave forfeited at the end of the 1971 leave year for an equal amount of sick leave. The retroactive substitution of annual for sick leave was permitted since the employee, through no fault of his own, was unaware of his leave balance, and had he been informed and able to, he would have chosen to apply the forfeited annual leave to a period of the illness in a timely manner. Also, the length of the illness foreclosed any possibility of using annual leave for vacations, etc. B-176093, July 10, 1972. See also B-178583, June 14, 1973. See also this chapter, "G. Restoration of Leave."

An employee, who became ill in May and did not return to work until September, requested that 64 hours of annual leave be substituted for an equivalent amount of sick leave for the period in August when he scheduled and took his vacation. Since the annual leave had been scheduled for use in August prior to the employee's illness and since the employee made a timely request for correction of leave records upon return to duty, the annual leave may be substituted for an equivalent amount of sick leave. B-192039, January 31, 1979.

(5) Administrative error—An employee who utilized advanced sick leave while filing for a disability retirement and who later substituted annual leave for the advanced sick leave may have the charge to annual leave recredited since she was erroneously advised that she would have to repay her advanced sick leave. There is no requirement to repay such leave if a disability retirement is granted. B-175144, March 16, 1972.

b. For leave without pay

(1) Mistake of law or fact—Where an employee was separated due to a reduction in force on August 31 and the employee's eligibility for within-grade increase had been delayed until September 2 due to excess of use of leave without pay, the employee may not substitute annual leave for

leave without pay. Generally, annual leave may be substituted for leave without pay only when there is a mistake of law or fact. B-180870, August 27, 1974.

(2) Administrative discretion—It is within the limits of proper administrative discretion to change the status of an employee from leave without pay to annual leave for the purpose of placing the employee in pay status 1 day prior to entry on military training duty. 37 Comp. Gen. 608 (1958).

(3) Disability compensation—Employee was injured on the job and subsequently received disability compensation. He may not substitute accrued leave for LWOP unless he refunds that portion of his disability compensation payments covered by that leave. B-117594, January 15, 1954.

(4) To avoid forfeiture of annual leave—Where an employee is granted leave without pay (LWOP) but then forfeits excess annual leave at the end of the year, the excess annual leave should be substituted for the LWOP. B-194176, January 3, 1980. See also 23 Comp. Gen. 677 (1944) and 22 Comp. Gen. 178 (1942).

(5) To avoid break in service—An employee who resigned one position to accept a position with another agency may be charged annual leave or leave without pay to avoid a break in service which was not intended by the parties involved and which resulted from a delay in receipt of the letter of appointment by the second agency. B-112802, February 2, 1953. See also B-197771, August 11, 1981.

(6) Following separation—An employee, who submitted a memorandum requesting emergency leave or resignation, committed suicide approximately 2 months after voluntary resignation. Since subsequent documentation shows the employee intended resignation, the separation date may not be changed for purposes of granting sick leave, annual leave, or leave without pay until death. The separation date may not be changed in the absence of violation of regulation or administrative error failing to effect intent of the parties. B-189895, November 2, 1977.

(7) Temporary employee—An employee who received advance credit of annual leave as a temporary employee used all that leave and was placed in a leave-without-pay (LWOP) status to cover the remainder of his absence. When he was later appointed to a permanent position during the same leave year and received advance crediting of additional annual leave, he

requested it be retroactively substituted for part of the LWOP period previously charged. The request is denied. The prior period of LWOP was properly charged because the employee did not have sufficient leave to cover his absence. Since the entitlement to additional advance annual leave arose only because of his new employment status, it may not be retroactively substituted for any period prior to the first date it became available for his use. Monideep K. De, 67 Comp. Gen. 594 (1988).

(8) Donated annual leave—death of employee—Under the Temporary Leave Transfer Program for fiscal year 1988, the retroactive substitution of donated annual leave for leave without pay after the death of a leave recipient was improper. Any unused donated leave remaining to the credit of a leave recipient after his death should have been restored to the leave donors. Harold A. Gibson, 68 Comp. Gen. 694 (1989).

c. Terminal leave

(1) Administrative discretion—The administrative authority to grant terminal, annual, or vacation leave immediately prior to separation from federal service, when the separation is known in advance, is limited to cases where the exigencies of the service require such action since the agency's discretion is not unlimited. 34 Comp. Gen. 61 (1954); 24 Comp. Gen. 511 (1945). Furthermore, the failure of an agency to grant leave under such circumstances is not construed as administrative error under 5 U.S.C. § 6304(d)(1). B-182608, February 27, 1975. However, if the employee's separation was not in conformance with established agency policy or regulations or with the intent of the parties especially regarding counseling of the employee and permitting the use of leave, the employee may be restored to the rolls for the purpose of using the unpaid leave. B-182608, *supra*; B-182027, December 23, 1974; and B-174975, March 31, 1972. See also B-121712, October 28, 1954; and B-124148, June 9, 1955.

An employee, who is on sick leave at the time his disability retirement application was approved, should be allowed to continue on sick leave and to select the separation date most advantageous to him. 61 Comp. Gen. 363 (1982). Where an employee took total accrued annual leave (6 hours) during the final 6 hours of his last day of employment before separation, the rule regarding terminal leave does not apply, since the employee substantially worked the entire final pay period and worked part of the last day of that period. The employee could properly accrue and use the leave during the last day of employment. B-190374, January 20, 1978. See also Emmitt Sheridan, B-223876, June 12, 1987.

d. Traveltime

(1) To and from overseas posts

(a) Generally—Under 5 U.S.C. § 6303(d) an employee, (1) who is authorized to accumulate up to 45 days of annual leave (see 5 U.S.C. § 6304(b)), (2) whose post of duty is outside the United States, and (3) who is returning on leave to the United States or to his place of residence, outside the area of employment, in the Commonwealth of Puerto Rico or the territories or possessions of the United States, may be granted leave-free traveltime for all time actually and necessarily occupied in going to or from a post of duty and time necessarily occupied awaiting transportation. This authority is limited to one period of leave in a prescribed tour of duty at a post outside the United States. See also 5 C.F.R. § 630.207 which requires employees to designate their place of residence in their request for home leave.

(b) Travel from Alaska or Hawaii—Leave-free traveltime under 5 U.S.C. § 6303(d) is not available for travel between Hawaii or Alaska and the continental United States since they are not outside the “United States” as defined by 5 U.S.C. § 6301(1). B-171947.62, November 27, 1974; and 55 Comp. Gen. 1035 (1976).

(c) Employee hired overseas—Overseas employees recruited locally while temporarily outside the United States may be eligible for leave-free traveltime if it is determined that their stay abroad was not of such duration or under such circumstances as to constitute a residence abroad rather than in the United States. 35 Comp. Gen. 244 (1955).

e. Other traveltime

(1) Administrative discretion—It is a matter of administrative discretion whether to charge an employee annual leave for traveltime involving personal convenience travel in excess of that required for official travel alone. Thus, where an employee returning from temporary duty interrupts his trip for personal reasons over a weekend, it is within the discretion of the agency to charge the employee annual leave for the completion of his return travel on Monday. 46 Comp. Gen. 425 (1966). See also 40 Comp. Gen. 53 (1960); B-175627, July 5, 1972; B-163654, June 22, 1971; and B-171420, March 3, 1971. See also Francis A. Brennan, B-210686, October 19, 1983.

(a) Examples—Use of POV instead of common carrier: 56 Comp. Gen. 865 (1977); and B-187315, May 5, 1977. See also Chapter 5 of this title, “A. Administrative Leave.”

- Indirect route to new duty station: B-192199, January 31, 1979; and B-189808, April 28, 1978.
- Delay or interruption for personal reasons: B-185652, December 28, 1976; and B-188012, May 10, 1977.
- Abandons duty assignment for personal reasons: B-188702, May 19, 1978.
- Uses annual leave prior to temporary duty assignment which is canceled: must charge hours representing vacation—B-191588, January 2, 1979; discretionary on charging annual leave for return travel to headquarters—B-191588, January 2, 1979; and B-122739, February 10, 1977.
- Reviews work at home with agency approval prior to departure: B-193820, January 9, 1980.
- Discretion to charge annual leave for excess traveltime permits agency to require employee to submit accurate time and attendance reports for each day traveled: 56 Comp. Gen. 104 (1976).

(b) Limitations on discretion—Although matters of charging leave to an employee for traveltime are primarily matters for the administrative office, our Office will in an appropriate situation disapprove the granting of excess time off without a charge to leave, as well as an unwarranted charge of annual leave. Thus, an employee who was authorized travel by privately owned vehicle but whose traveltime was determined on the basis of travel by commercial carrier was erroneously charged annual leave. 39 Comp. Gen. 250 (1959).

However, a charge to annual leave is required for excess traveltime based on reasonable driving time. An employee left the West Coast by plane at 7:30 p.m. on Thursday and arrived at his home on the East Coast at 11:45 a.m. the following day. It was not proper for the agency to charge him 4 hours annual leave for not reporting to the office Friday afternoon since, being entitled to a normal period of rest, he could have remained overnight in California and returned to his official duty station during normal working hours on Friday. B-181363, August 23, 1974.

GAO did not object to an agency’s action in excusing an employee without charge to leave for excess traveltime caused by an airline strike. B-160278, December 23, 1966.

Employees who were scheduled to attend a meeting to begin on Tuesday were authorized to travel to the meeting on Monday. Where the employees departed for the meeting on Sunday for reasons of personal convenience, they should not be charged annual leave for Monday since on a constructive travel basis they would have traveled on Monday. B-180021, September 5, 1978.

An employee on temporary duty was delayed when his automobile suffered a mechanical breakdown. Since use of his automobile was advantageous to the government and since the employee's actions were reasonable and in accordance with the agency instructions, the employee should not be charged annual leave in connection with the excess traveltime. B-186829, January 27, 1977.

(c) Involuntary leave—Where an employee is voluntarily absent from his official duty station, it is proper for the agency to charge him annual leave. B-166469, September 25, 1969; and 61 Comp. Gen. 558 (1982). An agency that bused employees during normal working hours to its new offices prior to relocation may charge an employee annual leave where she refused to be bused and, thus, refused to report for duty. B-186095, April 26, 1976. See also Chapter 5 of this title "F. Leave Without Pay."

Annual leave should be charged for time spent by new appointees on erroneously authorized house-hunting trips. 58 Comp. Gen. 744 (1979). See also "G. Restoration of Leave" in this chapter.

(d) Repayment of excess leave—Where an employee was granted excess annual leave, he may elect to have the excess leave charged against later accruing annual leave under the provisions of 5 U.S.C. § 6302(f). B-189975, October 19, 1977. The employees may elect the method of repayment under 5 U.S.C. § 6302(f) even if the employee may have been aware of the overcharge at the time it occurred. The employee's actual or constructive knowledge of the error is relevant only when waiver of overpayment is considered under 5 U.S.C. § 5584. B-187692, October 13, 1977.

An employee may elect to refund excess annual leave by use of compensatory time available for use at the time the excess annual leave was taken. 59 Comp. Gen. 253 (1980), distinguishing 45 Comp. Gen. 243 (1965).

(e) Flexible work schedule—An employee working a flexible schedule in accordance with 5 U.S.C. § 6122(a) elected the first day of the pay period as

a "flex day." When the agency was closed for that entire day because of weather conditions, she claimed entitlement to an additional day off in lieu of that day. Employees taking a day off or a "flex day" under a flexible schedule are in a nonpay status on those days, in contrast to employees on approved leave. Since the employee was not in a pay status on the day the agency closed because of weather conditions, she has no entitlement to an additional day off. The situation is not analogous to a holiday where employees are in a pay status. Ann Knodle, B-217080, June 3, 1985.

## G. Restoration of Leave

### 1. Generally

Leave forfeited by operation of 5 U.S.C. § 6304(a) or (b) (30-day or 45-day or personal ceiling limitation on accumulated leave) may be restored under 5 U.S.C. § 6304(d), if the forfeited leave resulted from (1) an administrative error, (2) the exigencies of public business when the annual leave was scheduled in advance, or (3) sickness of the employee when the annual leave was scheduled in advance.

Employee requested annual leave from his agency during June that, if granted, would have avoided forfeiture of annual leave. Agency denied request because of employee's pending assignment to training at Industrial College of the Armed Forces for remainder of the year. Since the Industrial College has a restrictive leave policy for its students, it could grant him only 40 hours leave during school year and before academic recess period from December 18, 1992, to January 1, 1993, leaving employee with 80 hours of leave subject to forfeiture. Employee elected not to take annual leave during the academic recess period. Employee's claim for restoration of annual leave may be granted only to the extent the employee's "use or lose" leave balance of 80 hours exceeds the leave the employee could have taken during academic recess period. Dennis J. Hubscher, B-252088.2, September 29, 1993.

### 2. Leave scheduled in advance

#### a. General rule

Leave which is forfeited due to exigencies of public business or sickness of the employee must have been scheduled in writing in advance to be considered for restoration. See 5 U.S.C. § 6304(d)(1)(B) and (C), and 5 C.F.R. § 630.308. This requirement (that leave be scheduled in advance) is statutory and may not be waived or modified even where extenuating



circumstances may exist. 56 Comp. Gen. 470 (1977); and B-193567, May 24, 1979. This requirement may not be waived even for extenuating circumstances such as those that existed in Vietnam at the end of leave year 1974. B-194545, June 15, 1979; and B-191379, September 28, 1978. This rule also applies to employees who are performing undercover assignments. B-191540, December 8, 1978. See also William K. Knotts, B-248232, September 22, 1992.

b. Failure to give actual notice

The leave must be scheduled in writing. B-187104, September 28, 1978. Furthermore, the leave must be scheduled before the third pay period prior to the end of the leave year, and scheduling the leave on the first day of the third pay period is not sufficient. B-194459, August 22, 1979.

Some employees of the Norfolk Naval Shipyard, on approved leave for the remainder of the 1987 leave year ending January 2, 1988, forfeited up to 4 hours of annual leave as a result of the President declaring the last half (4 hours) of the scheduled workday on December 24, 1987, as a half-day closing. As a result, the employees' annual leave accounts exceeded the maximum carryover of 240 hours. There is no authority to restore the forfeited annual leave in excess of statutory limit of 240 hours for carryover into the next leave year. Norfolk Naval Shipyard, 68 Comp. Gen. 630 (1989).

c. Failure to counsel

An exception to the general rule on scheduling requirements exists where the agency has implemented a written regulation which requires that the employees be counseled concerning a possible forfeiture of annual leave. If the agency violated such a regulation, the forfeited leave may be restored under 5 U.S.C. § 6304(d)(1)(A). 55 Comp. Gen. 784 (1976). A general statement of supervisory responsibility will not be sufficient. B-192510, April 6, 1979. Where a request for leave is submitted but not approved, see "Administrative error," below.

d. Early retirement

An agency erroneously advised two employees who had qualified for early retirement benefits that they were subject to mandatory age retirement. In anticipation of their separation, the employees applied for voluntary retirement at the end of the 1985 leave year and did not schedule or use

annual leave exceeding their personal leave ceilings. By the time the agency discovered its error and the employees withdrew their retirement applications, they had insufficient time to schedule and use much of their excess annual leave and they forfeited that leave. The forfeited annual leave may be restored to the employees under 5 U.S.C. § 6304(d)(1)(A), because the record shows that the forfeiture resulted from an administrative error. Paul A. Carr and Jerald P. Seach, B-222221, September 8, 1986.

e. Employee cancels restoration request

Even though an employee may have submitted a schedule for use of annual leave prior to expiration of the 1986 leave year, his annual leave may not be restored where he canceled the leave requested for reasons other than exigency or sickness. George H. Mikos, B-245117, January 21, 1992. Affirmed B-245117.2, June 19, 1992.

3. Administrative error

a. Generally

Under 5 U.S.C. § 6304(d)(1)(A), annual leave lost through forfeiture under section 6304 shall be restored to the employee if lost because of "administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960." If the employee is separated before the error is discovered, the restored leave is subject to credit and liquidation by lump-sum payment if a claim is filed within 3 years immediately following the date of discovery of the error. 5 U.S.C. § 6304(e).

The failure to give actual notice of this scheduling requirement to the employees is not an administrative error since the employees are charged with actual or constructive notice of the requirement. 56 Comp. Gen. 470 (1977); B-193567, May 24, 1979; and B-187104, March 8, 1978.

b. What constitutes an administrative error

(1) Failure to counsel employee to avoid forfeiture—An employee who retired on December 31, 1974, with 560 hours of annual leave (and a personal ceiling of 480 hours) and then accepted a temporary appointment effective January 1, 1975, did not receive a lump-sum payment for his accrued and accumulated leave but rather had his leave transferred to his new position resulting in a forfeiture of 80 hours. The determination as to

what constitutes administrative error is primarily for the employing agency. Therefore, if the agency concerned determines that it violated a mandatory policy or regulation requiring counseling employees to avoid forfeiture, then the leave may be restored under 5 U.S.C. § 6304(d)(1)(A). 55 Comp. Gen. 784 (1976).

In the absence of a mandatory policy, an employee's claim for restoration of forfeited annual leave is denied since the agency's failure to counsel him about possible forfeiture of annual leave does not constitute administrative error under 5 U.S.C. § 6304(d)(1)(A) (1982). Amos Knight, B-234528, October 6, 1989.

(2) Failure to act upon request—Where an employee submits a bona fide, formal, and timely request for leave, there can be no discretion on the part of the agency whether to schedule the leave or not. The agency must approve and schedule the leave at the time requested by the employee or, if that is not possible because of the agency's work load, at some other time. Where the employee demonstrates that, but for an administrative error in failing to schedule the requested leave or presenting the case to the proper official for a determination of a public exigency, the leave was lost because of a public exigency or sickness and was not lost due to the fault of the employee, then the employee is entitled to restoration of the leave under 5 U.S.C. § 6304(d)(1)(A). 58 Comp. Gen. 684 (1979); 57 Comp. Gen. 325 (1978); B-190263, July 5, 1978; and B-189085, April 13, 1978. See also Jack V. Morkal, B-232269.2, August 22, 1989.

If an agency is unable for the balance of the leave year to approve and schedule an employee's request for leave, the agency will not be required to perform the needless task of approving and immediately canceling the leave. However, if the agency is unable, due to an exigency of public business, to reschedule the requested leave during the current leave year, the failure to submit the matter to the designated official for his determination of the exigency constitutes an administrative error which would support restoration of the annual leave under 5 U.S.C. § 6304(d)(1)(A). B-187104, September 28, 1978; and B-187104, March 8, 1978. See also George A. Raub, B-212548, January 24, 1984.

Where the former Office Administrator for an Independent Counsel failed to accept requests for the scheduling of annual leave and inconsistently handled excess annual leave in the employees' leave accounts, we conclude that leave in excess of the 240-hour ceiling may be restored on

the basis of administrative error under the provisions of 5 U.S.C. § 6304(d)(1)(A). Office of Independent Counsel, B-252501, June 24, 1993.

(3) SES member—transfer to presidential appointment—An agency failed to advise a career Senior Executive Service (SES) member prior to receiving a presidential appointment to an Executive level IV position that he could elect to continue receiving annual and sick leave or other SES benefits during his presidential appointment, as provided in 5 U.S.C. § 3392(c) (1982). As a result, the employee placed his annual leave and sick leave balance in abeyance and did not elect to retain leave benefits for a period of 4 years. The agency's failure to properly advise the employee constituted an unwarranted personnel action and the annual and sick leave the employee would have earned during this period may be retroactively restored. Anthony J. Calio, 66 Comp. Gen. 674 (1987).

(4) Failure to determine exigency of public business—The general rule concerning the restoration of annual leave is that leave lost through forfeiture under 5 U.S.C. § 6304 may be restored to the employee if it is lost because of exigencies of the public business when the annual leave was scheduled in advance. See 5 U.S.C. § 6304(d)(1)(B) (1976). The determination that the exigency is of such importance as to preclude the use of scheduled annual leave is to be made by a designated agency official as described in 5 C.F.R. § 630.305 (1980). However, we have held that it is immaterial if an appropriate agency official has not made a determination as to an exigency since a failure to present the case to a proper official for an exigency determination constitutes an administrative error which would allow restoration of annual leave. B-200027, August 24, 1981.

(5) Failure to follow mandatory regulation—Where an agency has promulgated written regulations requiring counseling to avoid forfeiture of annual leave, the failure to counsel constitutes an administrative error under 5 U.S.C. § 6304(d)(1)(A). 55 Comp. Gen. 784 (1976).

Where an employee elects to be carried on a continuation-of-pay status for a 45-day period after a job-related injury under the authority of 5 U.S.C. § 8118 and the agency, contrary to a mandatory regulation, refuses to continue his pay but requires him to take leave to cover periods of his absence attributable to the injury, the annual leave subject to forfeiture may be restored as leave lost because of administrative error. 58 Comp. Gen. 507 (1979).

An employee who was required to use compensatory time before using annual leave did not schedule use of annual leave and forfeited 208 hours of excess annual leave. Although agency regulations required supervisors to schedule annual leave to avoid forfeiture, the unusual circumstances which resulted in the forfeiture of leave in this case do not provide a basis for restoration of the forfeited leave due to administrative error. B-186484, June 7, 1977.

An employee failed to use 140 hours of restored annual leave within the 2-year period permitted by the Office of Personnel Management regulation at 5 C.F.R. § 630.306 (1993), thus resulting in its forfeiture a second time. The agency's failure to plan and schedule the employee's leave to avoid forfeiture, as required by the agency's nondiscretionary policy, constituted administrative error. The error may be corrected by substituting the restored leave for annual leave the employee took during the period. The resulting forfeited annual leave may be restored under 5 U.S.C. § 6304(d)(1)(A) (1988). Charles R. Cox, 73 Comp. Gen. 51 (1993).

(6) Employee on extended illness—Where an employee suffers a prolonged illness before the end of a leave year it is presumed that, if the employee had been properly advised of his annual leave balance, he would have requested scheduling of annual leave in order to avoid forfeiture. B-193431, August 8, 1979; and B-182608, February 19, 1976. Thus, where such an employee was not given notification that he would forfeit annual leave if he did not apply for it, an administrative error occurred and the forfeited leave may be restored to the employee. B-187777, February 27, 1979, modifying B-187777, January 3, 1978. However, when the employee applied for disability retirement and the agency placed him on leave without pay on December 31, in order to preserve his entitlement to cost-of-living increases in his annuity pursuant to CSC regulations, any leave forfeited after December 31, but before the end of the leave year, is not forfeited because of administrative error and may not be restored. B-187777, February 27, 1979.

An employee of the Department of the Army who was absent from work from June 21, 1982, through January 23, 1983, due to a work injury, and received workers' compensation under the Federal Employees' Compensation Act (5 U.S.C. Chapter 81) during the period, forfeited 47 hours of annual leave in the 1982 leave year. Employees only received annual notices warning them in general. The employee was not specifically notified that in his case he would forfeit the leave if it were not scheduled leave. We presume he would have taken action to avoid forfeiture if he had

been properly notified. The 47 hours of leave may be restored. Leonard J. Milewski, 63 Comp. Gen. 180 (1984).

An employee who went on sick leave on October 23, 1981, through the end of leave year 1981 and forfeited 104 hours of annual leave is not entitled to restoration of the forfeited leave and additional lump-sum leave since the leave was not scheduled. This case does not fall within our decisions which presume scheduling of the leave during an extended period of absence due to illness. This employee's illness was of shorter duration, he was aware of his leave balance and knew that he was responsible for scheduling the leave to avoid forfeiture, and, in any event, it was not clear that he would have scheduled the leave. John E. Brady, B-214337, August 6, 1984.

An employee scheduled annual leave for use in November because he was told that no leave requests would be granted in December and January but became ill so that he was unable to take the annual leave as scheduled. He returned to work from sick leave 10 workdays before the end of the leave year but did not request rescheduling of annual leave for that period, and, thus, forfeited 80 hours of leave. He is entitled to restoration of his leave under 5 U.S.C. § 6304 and Office of Personnel Management guidelines since he scheduled the leave in advance and his illness occurred late in the year and was for such duration that by the time he returned to work his leave would not have been approved, even if he had formally requested it, because of the exigencies of the public business. Walter Schmidt, B-223238, February 27, 1987.

(7) Erroneous lump-sum leave payment—An employee resigned from position with USIA and was appointed the following day to position with Air Force. Lump-sum payment for annual leave was erroneous, and Air Force should have reccredited leave at time of appointment rather than date employee completed repayment of lump-sum amount. Leave forfeited as a result of the Air Force's failure to recredit leave account until lump-sum amount had been repaid shall be restored under 5 U.S.C. § 6304(d)(1)(A). 59 Comp. Gen. 335 (1980).

(8) Failure to collect lump-sum leave payment—In our decision B-200327, November 13, 1980, we determined that a lump-sum payment for unused annual leave which is correctly and legally made to a federal employee upon his separation from government service may not later be considered an "erroneous" payment within the meaning of the statute authorizing waiver of erroneous overpayments of compensation, even though the

employee concerned accepts another federal appointment without any awareness that he will then become legally obligated to refund part of that lump-sum leave payment by accepting reemployment. Hence, collection of the employee's resulting debt may not be waived under 5 U.S.C. § 5584. Accordingly, if the hiring agency erroneously fails to collect the refund and recredit the leave to him on the date of reemployment, leave which cannot later be recredited because it is subject to forfeiture limitations may be restored to a separate leave account under the leave restoration provisions of 5 U.S.C. § 6304(d). Compare 55 Comp. Gen. 784 (1976).

(9) Erroneous leave ceiling—Due to administrative error, an employee was led to believe he was entitled to carry over 45 days of annual leave as opposed to 30 days. Employee carried over more than 30 days' leave in several years prior to his retirement. Pursuant to 5 U.S.C. § 6304(d)(1)(A) annual leave in excess of the 30 days may be restored and the employee may be paid for all annual leave accrued as of the date of retirement. B-201358, August 24, 1981.

(10) Failure to credit excess leave in restored leave account—An employee who was reinstated after an unwarranted separation must have his excess annual leave credited to a separate leave account as provided under the Back Pay Act, 5 U.S.C. § 5596(b)(1)(B)(i), and the failure to do so constitutes administrative error under 5 U.S.C. § 6304(d)(1)(A). B-204628, July 7, 1982.

(11) Forfeiture under other provisions—An employee, who resigned August 13, 1973, forfeited 93 hours which could not be liquidated by lump-sum payment under 5 U.S.C. § 5551(a). He may not have such leave restored under 5 U.S.C. § 6304 as leave lost by administrative error since restoration applies only to leave forfeited by operation of section 6304 which limits annual leave carryover to new leave year. B-182608, February 27, 1975. However, an employee, who resigned November 10, 1973, and forfeited annual leave prior to the amendment to 5 U.S.C. § 5551(a), by Public Law 93-181, December 14, 1973, may be restored to the rolls for the period of the unused annual leave where the record indicates that the parties did not intend a forfeiture to occur and it was the agency's policy to avoid forfeiture in such circumstances. B-191210, July 21, 1978. See also "Terminal leave" in this chapter and Chapter 3 of this title "Lump-Sum Leave Payments."

(12) Forfeiture because of additional holidays—Where an employee takes annual leave for the remainder of the leave year (13 days) but is charged

for only 11 days because two additional holidays were declared by executive order during that period, there is no authority under 5 U.S.C. § 6304 to restore the 6 hours of forfeited annual leave in excess of the statutory limit of 240 hours for carry over into the next leave year. B-182549, August 22, 1975; and B-207139, September 29, 1982. See also Norfolk Naval Shipyard, 68 Comp. Gen. 630 (1989).

An employee on approved leave for the remainder of the 1981 leave year forfeited 4 hours of annual leave as a result of the President granting 4 hours of administrative leave on December 24, 1981. The failure of the employee's agency to counsel him of GAO's holding in Joseph A. Seymour, B-182549, August 22, 1975, that there is no authority to restore leave forfeited in this type of situation, does not constitute administrative error since the agency did not have a regulation requiring that its employees be counseled concerning possible forfeiture. William M. Gaultieri, B-207139, September 29, 1982.

(13) Failure to credit certain judges and law clerks—Magistrate and bankruptcy judges and law clerks who are entitled to credit for annual and sick leave, which was initially not credited to them due to an erroneous agency position that they were not subject to the Annual and Sick Leave Act, cannot obtain credit for annual leave in excess of the statutory maximum carryover ceiling of 240 hours. Granting their claim for annual leave credit beyond the statutory maximum would result in a windfall to them and run counter to a judicial decision addressing comparable circumstances. Leave Restoration for Judicial Branch Employees, B-230807.2, September 13, 1991.

c. What does not constitute administrative error

(1) Scheduling problems—The failure of an agency to advise an employee of the scheduling requirements of 5 U.S.C. § 6304(d)(1)(B) and (C) does not constitute an administrative error since employees are charged with constructive knowledge of those requirements. 56 Comp. Gen. 470 (1977); B-193567, May 24, 1979; B-192510, April 6, 1979; and B-187104, March 8, 1978. In the absence of a written regulation requiring counseling to avoid forfeiture, a general statement regarding a supervisor's responsibility to insure that leave is scheduled is not sufficient. B-192510, April 6, 1979. Furthermore, the fact that the supervisor does not require leave requests to be in writing does not constitute administrative error since the burden is on the employee to submit a written request for annual leave. B-192510, April 6, 1979; and B-187104, September 28, 1978.



(2) Erroneous advice or delays—Where an employee obtained an unofficial estimate of projected retirement annuity but later postponed such retirement due to an error in the estimate, he may not have forfeited excess annual leave restored since the calculation of error did not involve consideration of leave matters and, thus, leave was not forfeited due to administrative error. B-191041, June 2, 1978.

An employee, who did not use excess annual leave because of alleged delays in processing his disability retirement application, may not have forfeited leave restored in the absence of an agency regulation requiring counseling on impending forfeiture of annual leave. B-187055, March 4, 1977.

Prior to end of leave year an employee was erroneously advised to use 15 hours of annual leave to avoid forfeiture, and error resulted in employee's leave ceiling being reduced from 360 to 345 hours. The statute does not provide for restoration of leave that is used rather than forfeited. B-196834, July 15, 1980. See also B-171716, March 26, 1971.

(3) Incorrect leave and earnings statements—Although employee's leave and earnings statement erroneously reflected lower leave balance, employee was on notice of error and leave forfeited at end of leave year may not be restored under 5 U.S.C. § 6304(d)(1)(A). B-195562, June 6, 1980. See also Priscilla Cooke, B-231759, January 4, 1989.

(4) Failure to promptly credit annual leave—An employee who transferred from the Social Security Administration (SSA) to the Department of Labor was erroneously given a lump-sum leave payment. He returned the payment, but his leave balance from SSA was not credited to his account until 2 years later. Even though it was an error not to have promptly credited the annual leave upon his transfer, since the employee had sufficient time to schedule and use the excess leave after it was credited, he may not be recredited with the leave which he forfeited at the end of the leave year. Wallie Breig, B-213849, May 14, 1984.

(5) Leave substituted for LWOP—Reemployed annuitant forfeited 60 hours of annual leave although he had requested and was granted 200 hours of leave without pay (LWOP) that year. Leave subject to forfeiture should be substituted for LWOP taken during that leave year. 23 Comp. Gen. 677, 688 (1944); and 22 Comp. Gen. 178 (1942). Leave was thus not forfeited and subject to restoration under 5 U.S.C. § 6304(d)(1)(A). B-194176, January 3, 1980.

4. Exigencies of public business

a. Generally

Under 5 U.S.C. § 6304(d)(1)(B) annual leave lost through forfeiture under section 6304 shall be restored to the employee if lost because of “exigencies of public business when the annual leave was scheduled in advance.” The determination that the exigency is of such importance as to preclude the use of scheduled annual leave is to be made by an agency official as described in 5 C.F.R. § 630.305.

b. Leave scheduled in advance

A second requirement for restoration under this condition is that the annual leave was scheduled in advance in writing prior to the third biweekly pay period prior to the end of the leave year. See 5 C.F.R. § 630.308.

Before leave forfeited due to exigencies of public business may be restored, it must have been scheduled in advance. 58 Comp. Gen. 684 (1979); B-193567, May 24, 1979; B-191379, September 28, 1978; and B-187104, March 8, 1978.

However, when an employee submits a timely request in writing for leave, there can be no discretion whether to schedule the leave or not. The agency must approve and schedule the leave either at the time requested by the employee, or, if not possible because of the agency’s work load, at some other time. In the case of an exigency of public business, the matter must be submitted to the designated official for his official determination. The agency’s failure to present the case to the proper official for determination of an exigency of public business constitutes administrative error. 58 Comp. Gen. 684 (1979); B-187104, September 28, 1978; and “3. Administrative error,” above.

c. What constitutes an exigency of public business

An employee scheduled 40 hours annual leave in writing for December 1979, but he forfeited 16 hours of such leave at the end of the 1979 leave year because he performed jury duty. He is entitled to have such annual leave restored. Since 5 U.S.C. § 6322, prohibits loss of or reduction in annual leave where employee is summoned to perform jury

service, it constitutes an exigency of the public business under 5 U.S.C. § 6304(d)(1)(B). 60 Comp. Gen. 598 (1981).

d. What does not constitute an exigency of public business

Two IRS employees who were suspended in December 1978, due to bribery indictments, forfeited annual leave which could not be used during nonduty, nonpay status. Although leave was scheduled in advance and employees were later returned to duty, they did not forfeit leave because they were performing work. Leave may not be restored under exigencies of public business provision. B-197957, July 24, 1980. See also B-209958, March 2, 1983.

An AID employee who separated and forfeited 104 hours of annual leave allegedly due to an exigency of the public business is not entitled to lump-sum payment for the forfeited hours since the appropriate agency official did not make the requisite exigency determinations. B-198177, March 31, 1981. Moreover, although agency failure to make proper exigency determination may not in and of itself bar restoration of forfeited annual leave under 5 U.S.C. § 6304(d)(1), such leave may not be restored in the absence of evidence that it was timely requested and scheduled in writing and that its use was officially denied. B-197704, October 7, 1980.

5. Sickness

a. Generally

Under 5 U.S.C. § 6304(d)(1)(C) annual leave lost through forfeiture under section 6304 shall be restored to the employee if lost because of "sickness of the employee when the annual leave was scheduled in advance."

b. Leave scheduled in advance

Under 5 C.F.R. § 630.308 (1995) the annual leave must have been scheduled in writing before the start of the third biweekly pay period prior to the end of the leave year.

c. Employee on extended illness

A Park Police officer who was injured in the performance of duty and was thereafter absent from duty for nearly 1 year without charge to leave pursuant to 5 U.S.C. § 6324, forfeited 204 hours of annual leave. The

forfeited leave may be restored to his account under 5 U.S.C. § 6304(d)(1)(C) since, in cases of prolonged illness preceding the end of a leave year, the employee may be presumed to have requested proper scheduling of annual leave otherwise subject to forfeiture. B-182608, February 19, 1976. See also Leonard J. Milewski, 63 Comp. Gen. 180 (1984), and John C. Brady, B-214337, August 6, 1984, at "3. Administrative error, b. What constitutes an administrative error, (6) Employee on extended illness."

An employee sustained a compensable on-the-job injury resulting in a prolonged recuperation period which extended beyond the end of the leave year. The fact that he scheduled annual leave after the injury, with the knowledge that he probably would be unable to use it, does not preclude restoration of the leave. The employee, who was covered by workers' compensation during the period, was not obligated to use the scheduled annual leave to avoid forfeiture. Bruce F. Scott, B-218728, December 10, 1981.

A prolonged illness preceding the end of the leave year raises a presumption that the employee would have requested proper scheduling of annual leave otherwise subject to forfeiture. B-193431, August 8, 1979; and B-187777, February 27, 1979, modifying B-187777, January 3, 1978.

An employee, whose disability retirement application was approved on October 27, 1976, scheduled use of his annual leave which was subject to forfeiture but did not use the scheduled annual leave since he was on extended sick leave pending his disability retirement. The forfeited leave may be restored under 5 U.S.C. § 6304(d)(1)(C) since neither the statutory language nor the legislative history of Pub. L. No. 93-181 indicates that annual leave which is not used as a result of extended sick leave pending disability retirement may not be restored under this provision. 58 Comp. Gen. 435 (1979).

## 6. Use of restored leave

### a. Forfeiture

An employee failed to use restored forfeited leave within the required 2-year period and the leave again was forfeited. Although the employee alleges that the agency erred in advising him regarding the rules for using restored leave, the leave may not be restored again. The 2-year requirement, which is contained in a regulation issued by OPM, has the

force and effect of law and may not be waived or modified by this Office. 5 C.F.R. § 630.306 (1991). Dr. James A. Majeski, B-247196, April 13, 1992. See also B-188993, December 12, 1977.

In 1973 an agency discovered an error in the rate of accrual of leave of an employee which resulted in crediting his leave account with 24 additional hours in 1972 and 26 additional hours in 1973. The leave which was credited in 1972 but forfeited without an opportunity to be used, may be restored. However, leave which was earned in a leave year but forfeited that same year may not be restored. B-186820, December 16, 1977.

An employee has no rights to further restoration and lump-sum payment of unused forfeited and restored 1977 leave, which was forfeited again at the end of the 1980 leave year. Although agency personnel gave him erroneous advice concerning his restored leave and failed to fix the date, as required by the regulations, for the running of the 2 years in which to use-or-lose his restored leave, no legal authority exists for further restoration of leave once it is forfeited a second time. William Corcoran, B-213380, August 20, 1984.

b. Failure to charge restored leave account

Where an agency fails to charge the restored leave account at the employee's request, restored annual leave which is subsequently forfeited may be restored to an employee's leave account. 56 Comp. Gen. 1014 (1977).

7. Under Back Pay Act of 1966

a. Generally

An employee who loses leave as a result of an unwarranted or unjustified personnel action under the Back Pay Act of 1966, 5 U.S.C. § 5596, shall be recredited with all annual and sick leave which accrued during the period. Further, through the enactment of Pub. L. No. 94-172, December 23, 1975, 89 Stat. 1025, there is no limitation on the amount of annual leave which may be restored, and any leave in excess of the maximum allowable shall be credited to a separate leave account. 5 U.S.C. § 5596(b)(1)(B) (1994) and 5 C.F.R. §§ 630.505 and 550.805(g) (1995).

An employee who was erroneously separated and later reinstated is entitled to credit for annual leave earned during the erroneous separation

under the authority of 5 U.S.C. § 5596. Annual leave which is in excess of the employee's annual leave ceiling shall be credited to a separate leave account which, under regulations, gives the employee 2 years from the date the leave is credited to the separate account in which to schedule and use such annual leave. 57 Comp. Gen. 464 (1978). See 5 C.F.R. § 550.805(g) (1995).

b. Erroneous holiday

The agency erroneously applied Executive Order No. 11582, February 11, 1971, and designated Tuesday, instead of the prior Saturday, as a holiday "in lieu of" Washington's Birthday for employees with a Tuesday-through-Saturday workweek. To correct the error, the agency paid holiday pay for Saturday and charged employees annual leave for Tuesday. However, under these circumstances this charge to leave constitutes an unjustified or unwarranted personnel action and the leave should be restored. B-127474, February 9, 1979.

c. Involuntary leave

(1) Disability retirement—An employee was placed on involuntary leave pursuant to CSC regulations pending action on an agency-filed application for disability retirement. She is not entitled to restoration of leave under the Back Pay Act, 5 U.S.C. § 5596, when the agency-filed application was initially denied since the determination to place her on leave was based on competent medical findings. B-184522, April 21, 1977, affirming B-184522, March 16, 1976. However, when the agency-filed application was initially denied by the CSC and the agency appealed determination, agency must either restore the employee to duty, or take steps to remove her on disability grounds. Agency's failure to do so constituted an unwarranted or unjustified personnel action under the Back Pay Act. B-184522, March 16, 1976. See also B-206237, August 16, 1982.

An employee was on sick leave, annual leave, and then on approved leave without pay pending a determination on his application for disability retirement, including his unsuccessful appeal of the denial of his application. He may not have leave recredited under 5 U.S.C. § 5596 since the record does not establish that the leave was involuntary or that the employee was ready, willing, and able to work during that period. B-128314, January 8, 1979. For same principle, but involving regular retirement rather than disability retirement, see Ralph C. Harbin, B-201633, April 15, 1983.

Based upon medical evidence from an employee's personal physician and an examination by agency physician showing that the employee could not perform the duties of her position, the agency placed the employee on involuntary leave and submitted an agency initiated disability retirement application. After initial rejection of the application, the agency appealed to OPM, which approved the retirement application. The employee then appealed to the Merit Systems Protection Board (MSPB), which ruled that the employee was not totally disabled. The employee claimed backpay for the entire period she was on involuntary leave. The claimant is entitled to backpay for the period between the initial denial of the application and the OPM granting of retirement. Once the application was granted it was appropriate for the employee to be retired. MSPB's finding that the employee was not totally disabled did not make improper the agency action in placing the employee in a nonpay status pending the appeal to MSPB. 63 Comp. Gen. 156 (1984).

Agency placed employee on involuntary leave following fitness-for-duty examination and filed for her disability retirement. After disability retirement was denied by Office of Personnel Management (OPM), employee claimed backpay for period of involuntary leave and leave without pay. Claim is denied since OPM did not overturn medical evidence submitted by agency and agency action was based on competent medical evidence. Memphis Defense Depot, B-214631, August 24, 1984.

The Office of Personnel Management (OPM) determined that an employee, placed on involuntary leave on the basis of medical evidence provided by his own physician and the results of a fitness-for-duty examination, was not eligible for disability retirement. The agency failed to return the employee to duty until 4 months later. The employee is entitled to backpay and restoration of leave for the period of involuntary leave subsequent to OPM's determination since the agency was required at that point to either return the employee to duty or initiate his separation on the grounds of disability. The employee's claim for the period prior to OPM's determination may not be allowed since the agency reasonably interpreted the medical evidence presented as indicating the employee's incapacity to perform his duties and OPM did not overturn that evidence. Albert R. Brister, B-217171, May 28, 1985.

(2) Employee illness—Based on a preliminary diagnosis of tuberculosis made by the employee's personal physician, the agency placed the employee on involuntary leave while confirmatory tests were being made. The agency's decision was based upon competent medical evidence, and

leave may not be restored under the Back Pay Act even though the required tests were not conducted by the employee's treating physician and the state-operated laboratories within a normal time period. B-181313, May 6, 1977, affirming B-181313, February 7, 1975. See also B-192956, April 9, 1979.

(3) Employee suspension—An employee who was suspended from employment after her arrest on criminal charges is not entitled to leave restoration after some of the criminal charges were dismissed since there was no finding that the suspension was an unjustified or unwarranted personnel action under the Back Pay Act. B-192643, July 6, 1979.

(4) Under Federal Employees' Compensation Act—buy back—An employee who uses annual or sick leave to recuperate from a work-related injury may "buy back" such leave pursuant to 20 C.F.R. § 10.310, be placed on leave without pay, and accept compensation for the injury under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8151. However, annual leave which is reinstated as a result of a "buy back" is subject to forfeiture under 5 U.S.C. § 6304(a) and may not later be restored. B-180010.12, March 8, 1979; B-187104, March 8, 1978; B-182608, August 9, 1977; B-184008, March 7, 1977; and B-204522, March 23, 1982. To avoid forfeiture, an employee may choose to be placed on annual leave during this period, and the employee would be required to refund a portion of the employee's compensation to the Department of Labor. B-180010.12, March 8, 1979; and B-182608, August 9, 1977.

An employee who wishes to "buy back" leave where there are no official records from which to determine the amount of leave taken may "buy back" leave on the basis of secondary evidence determined to be acceptable by the agency such as leave requests, leave and earnings statements, time and attendance reports, personal leave records, and certificates from supervisors and timekeepers. 58 Comp. Gen. 741 (1979).

Where an employee "buys back" annual leave used during work-related injury in order to receive workers' compensation payments, repurchased leave may be forfeited in reconstructing leave account of prior years and such forfeited leave may not be restored due to administrative error. B-204522, March 23, 1982; B-182608, August 9, 1977; and B-184008, March 7, 1977.

An employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from a work-related illness accepted workers'



compensation and bought back leave used. Upon reconstruction of the employee's leave records to show recredit of the leave as of the time it was used, 66 hours of repurchased restored and regular annual leave were found to be subject to forfeiture. Regular annual leave reinstated as the result of buy back and subject to forfeiture under 5 U.S.C. § 6304(a) (Supp. III 1979), may not be restored under 5 U.S.C. § 6304(d) nor may restored leave recredited to a prior leave year and subject to forfeiture under 5 C.F.R. § 630.306 (1982) be restored further. However, since the employing agency failed to apprise the employee of the consequences of buy back, the employee at his election may choose to be placed on annual leave for 1978 to avoid any or all forfeiture. The employee would then be entitled to be paid for the 66 hours of leave at the pay rates then in effect and he would have to refund the portion of workers' compensation covered by that leave. 62 Comp. Gen. 253 (1983).

Under the provisions of the Federal Employees' Compensation Act, an employee who uses annual or sick leave during absences from work in connection with work-related injuries or illnesses may "buy back" or repurchase such leave and accept workers' compensation for the period of such absences under the act. An employee may not use accumulated annual or sick leave in order to liquidate an indebtedness owed the agency since annual and sick leave may not be converted into a monetary equivalent in these circumstances. See Donald R. Manning v. United States, 7 Cl. Ct. 128, 133 (1984).

#### H. Waiver of Overcredit of Annual Leave

An employee's annual leave account was erroneously overcredited due to the agency's error in calculating her service computation date and, thus, the number of hours of leave she was to accrue each pay period. Since there was a positive balance remaining in the employee's leave account after the agency adjusted her account to correct the administrative error, there was no overpayment of pay or allowances which may be considered for waiver under 5 U.S.C. § 5584. Donna J. Williams, B-230366, June 27, 1988.

Where an employee's annual leave account was overcredited, the employee may be granted waiver only to the extent reconstruction of his leave account results in a negative leave balance. The hours deducted in reconstructing his annual leave account may not be waived or otherwise recredited. When an employee has sufficient leave to his credit to cover the adjustment there is no overpayment of pay which may be considered for waiver. Carl H. L. Barksdale, B-219505, November 29, 1985.

An employee's annual leave account was overcredited due to agency error as to his service computation date. Where the overcredit of annual leave has occurred during years prior to the year in which the error was discovered, the employee's leave account is to be reconstructed for each separate year involved to arrive at the proper current leave balance, and to determine whether an erroneous payment of salary occurred in any year where excessive use of leave resulted in a negative leave balance, the value of which becomes a debt due the United States subject to waiver. Stephen C. Small, B-250228, February 22, 1993.

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### I. Voluntary Leave Transfer Program

Under the Voluntary Leave Transfer Program, donated leave may not be transferred to the recipient or used after the medical emergency terminates and any unused transferred leave must be restored to the leave donors. Therefore, the retroactive substitution of a recipient's unused donated leave for the recipient's leave without pay after the death of the recipient was improper, and the payment of compensation resulting from the retroactive substitution was erroneous. The erroneous payment, however, may be subject to waiver. Mary Dawson, 70 Comp. Gen. 432 (1991). See also Harold A. Gibson, 68 Comp. Gen. 694 (1989).

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### J. International Dateline

An employee performing temporary duty in Guam celebrated the Fourth of July holiday there. He commenced return travel on the following day and, after crossing the international dateline, he arrived at his official duty station in Hawaii on the Fourth of July. Since the office was closed, he was unable to work. In accordance with 5 U.S.C. § 6103 (1982) and Executive Order No. 11,582, the employee's holiday observance was in Guam. However, he should not be required to use annual leave in Hawaii on the Fourth of July since it is appropriate for his agency to exercise its discretion and grant him an excused absence without loss of pay for the day. Crossing the International Dateline, B-229355, November 22, 1988.

# Lump-Sum Leave Payments

## A. Statutory and Regulatory Authorities

An employee (as defined by 5 U.S.C. § 2105) or an individual employed by the District of Columbia who is separated from the service is entitled to receive a lump-sum payment for accumulated and current accrued annual leave to which he is entitled by statute. The payment shall equal the pay the employee would have received had he remained in the service until the end of the period of annual leave, and the payment is considered pay for taxation purposes only. 5 U.S.C. § 5551(a).

An employee who enters active duty in the armed forces may elect to have his leave remain to his credit until his return from active duty. 5 U.S.C. § 5552.

Governing OPM regulations on lump-sum leave payments are contained in FPM Chapter 550, Subchapter 2 and FPM Supp. 990-2, Book 550, Subchapter 2.

## B. Entitlement

### 1. Payable upon separation

Employees who are separated from the service are entitled to a lump-sum payment for all unused annual leave through the last full pay period before separation. The right to a lump-sum payment vests on the date of separation. 33 Comp. Gen. 85 (1953).

### 2. Payable upon transfer or change of positions

#### a. Transfer to position not under leave system

Where an employee transfers to a position not covered by 5 U.S.C. §§ 6301-6312 and his accumulated leave cannot be transferred, such transfer may be regarded as a separation for the purposes of a lump-sum leave payment. 49 Comp. Gen. 189 (1969); 33 Comp. Gen. 622 (1954); and 33 Comp. Gen. 85, 88 (1953).

An executive branch employee who went on leave without pay in order to accept a position with a Congressional committee and who later resigned from his agency is entitled to lump-sum payment for annual leave upon date of separation and not the date he was placed on LWOP. B-191713, May 22, 1978.

Employees who resigned from a federal agency and accepted employment with federally funded Legal Services Corporation may be paid lump-sum

payments for annual leave pursuant to 5 U.S.C. § 5551 even though the Legal Services Corporation paid "cash bonuses" for certain amounts of leave. Community Services Administration, B-186449, January 24, 1977.

b. Change to intermittent employment with no regular tour of duty

Where an employee converts to a position as an intermittent employee with no regular tour of duty during an administrative workweek and where he will earn no leave and cannot transfer his leave, he shall receive a lump-sum payment for all annual leave accumulated under his prior position. 47 Comp. Gen. 706 (1968) and 33 Comp. Gen. 85, 88 (1953).

c. Transfers to other positions

(1) Judges and court employees—Where an employee of the Department of Justice takes a position with a federal judge or with the U.S. courts which is not covered by 5 U.S.C. §§ 6301-6312 and to which his accumulated leave is not transferrable, the employee shall receive a lump-sum leave payment to avoid forfeiture of the leave. 33 Comp. Gen. 622 (1954) and B-166640, May 21, 1969. See also B-128026, July 20, 1956. However, the judges of the Tax Court, which was removed from the executive branch and established as a constitutional court, were not regarded as being "separated from the service" as contemplated by 5 U.S.C. § 5551. Instead, their entitlement to payments for annual leave remained undisturbed and their accumulated leave would be paid upon separation or recredited upon return to a position covered by 5 U.S.C. §§ 6301-6312. 49 Comp. Gen. 545 (1970).

(2) Restoration in VA after 90-day temporary appointment with Army—In August 1987, immediately before beginning a 90-day temporary appointment with the Army, the claimant was notified that she had prevailed in an equal employment opportunity complaint against the Veterans Administration (VA). As a result, she was reinstated as a VA employee with backpay and restoration of leave from February 1984 until she started working for the Army. In view of her reinstatement by VA, she is treated as an employee who is transferred from one agency to another. Consequently, she first became entitled to a lump-sum leave payment at the end of her 90-day temporary appointment, and the Army must pay her for her full annual leave balance, including restored leave. Priscilla M. Worrell, 68 Comp. Gen. 548 (1989).

3. Payment optional

a. Duty in armed forces

An employee who entered active duty in the armed forces requested that his leave remain to his credit until his return, but never returned to federal service. The action should be recorded as a separation and the individual is entitled to receive a lump-sum payment. B-162148, October 5, 1967.

An employee who enters on active duty with the armed forces and elects to receive a lump-sum payment under 5 U.S.C. § 5552 relinquishes any right to a recredit of the leave upon return to federal service. Joseph P. Reap, B-180926, March 28, 1975.

A retired Regular officer serving in a civilian position who reports for 2 weeks' active duty is entitled to receive a lump-sum payment or to have his leave remain to his credit until his return from active duty. 49 Comp. Gen. 444 (1970).

b. Position in public international organization

Under 5 U.S.C. § 3582(a)(4), an employee who transfers to an international organization (as defined in 5 U.S.C. § 3581) is entitled to elect to retain his annual leave to his credit or to receive a lump-sum payment. If he elects the lump-sum payment but is reemployed within 6 months after transfer, he must refund the lump-sum payment to the agency. See also FPM Supp. 990-2, Book 550, S2-2a(2) regarding leave restored by operation of 5 U.S.C. § 6304(d)(1).

4. Lump-sum payment not payable

a. Transfer to position where annual leave is transferable

A lump-sum payment may not be made to an employee upon transfer to a position to which his annual leave is transferable, but instead his leave is transferred to his new position. 5 U.S.C. § 6308.

Where an employee resigns from one agency and is reemployed in another agency the following day, a lump-sum leave payment may not be made. If a lump-sum payment is erroneously made, the leave should be recredited at the time of reemployment, not after the lump sum amount has been repaid. 59 Comp. Gen. 335 (1980). See also Chapter 2, "G. Restoration of Leave."

b. Personal ceiling limitation

An employee may transfer all accumulated and currently accrued annual leave to his credit as of the date of transfer not in excess of the maximum limitation allowable under the leave system from which transferred, and that amount shall constitute the employee's annual leave ceiling until reduced under 5 U.S.C. § 6304(c). 48 Comp. Gen. 212 (1968).

c. Student trainee employed intermittently between full-time tours of duty

Normally, an employee who moves to a position as an intermittent employee with no regular tour of duty is entitled to a lump-sum payment for accrued annual leave. However, if the employee is a student trainee, the period of intermittent employment between full-time tours of duty shall not be regarded as a transfer or separation for purposes of lump-sum leave payment, and any leave earned under regular employment shall remain to his credit. 37 Comp. Gen. 523 (1958).

d. Exempted officers

When an employee subject to the annual and sick leave provisions of 5 U.S.C. § 6301 accepts a presidential appointment, which is exempted from those provisions, he may not receive a lump-sum payment for annual leave. 40 Comp. Gen. 164 (1960); 38 Comp. Gen. 386 (1958); 33 Comp. Gen. 177 (1953); and B-165516, November 22, 1968. The accumulated and accrued annual leave is to be credited for payment upon separation or death under 5 U.S.C. § 5551 or for recredit upon reemployment without a break in service in a position subject to the leave provisions. See 49 Comp. Gen. 545 (1970) and Judge Eugene Black, B-116694, January 28, 1976.

The Copyright Royalty Tribunal is obligated to make the lump-sum annual leave due a retiring Commissioner. Although none of the leave was earned at the Tribunal because the Commissioner is a presidential appointee serving in a position in the legislative branch not subject to the Annual and Sick Leave Act, he has leave to his credit carried over from service in a prior position in another agency. An employee's right to a lump-sum payment for accrued annual leave vests upon the employee's separation from the federal service, and it is the employing agency at the time of separation that must pay the employee for accrued annual leave to the employee's credit at the time of separation notwithstanding that the leave was earned in another agency. Presidential Appointees, 71 Comp. Gen. 411 (1992).

An Air Force employee with annual leave to his credit received a presidential appointment as a judge of the United States Court of Military Appeals, incident to which the judge claimed payment for his annual leave. A judge of this court is an "officer" as that term is defined in 5 U.S.C. § 2104(a) (1988), and therefore he is exempt from the leave act. Accordingly, his claim may not be paid because an employee with annual leave to his credit who receives an appointment to a position exempt from the leave act is not considered separated from the federal service for the purpose of receiving a lump-sum leave payment under 5 U.S.C. § 5551 (1988). The leave remains credited to him until he either separates from the federal service or returns to a position covered by the leave act. Judge Eugene R. Sullivan, 71 Comp. Gen. 522 (1992).

A Foreign Service Officer, who was appointed Ambassador (an excepted position in which no leave is earned) in 1972, retired as a Foreign Service Officer in 1975 but remained Ambassador until 1976. He may not be paid lump-sum payments for accrued annual leave upon retirement as a Foreign Service Officer because the statute and Department of State regulations preclude such payment until an exempt officer is separated from the federal service or is transferred to a specified position. B-186043, October 4, 1976.

If a lump-sum payment is made, the rate shall be the salary received prior to presidential appointment but the time period shall be projected from the date of retirement. 40 Comp. Gen. 579 (1961). If the employee has any leave in a separate account restored under 5 U.S.C. § 6304(d)(1), it shall be liquidated by lump-sum payment immediately upon transfer to the excepted position. FPM Supp. 990-2, Book 550, S2-2b(2).

e. Transfer from temporary position

An employee was voluntarily furloughed from a permanent position in order to accept a temporary position for 2 months, and then returned without a break in service to the permanent position. The annual leave which accrued in the temporary position shall be transferred and not paid in a lump sum. 33 Comp. Gen. 528 (1954).

f. Payable upon garnishment

Where the wife of a former employee seeks to garnish money due the employee for accrued annual leave for child support, and the former employee's whereabouts and/or continued existence is unknown, payment

may be made without determination of the status of the employee since in this case, under 5 U.S.C. § 5582, the wife would also receive any money due the employee if he is deceased. However, payment must be in accordance with the limitations contained in section 303(b) of the Consumer Protection Act, 15 U.S.C. § 1673(b), since under Office of Personnel Management regulations, those limitations also apply to garnishment of payments in consideration of accrued leave. Wesley E. Pitts, B-207015, December 14, 1982.

g. Absence without leave

Former employee claims backpay equal to amount the agency deducted from her lump-sum leave payment to cover overpayments of pay for periods of alleged absence without leave. It is within the agency's administrative discretion to place employees who refuse to comply with order to report to work on leave without pay. In view of the administrative discretion which exists with respect to determinations concerning absence from duty, and in the absence of any finding by an appropriate authority of an unjustified or unwarranted personnel action, her claim is denied. Verda L. Campbell, B-221067, June 1, 1987.

C. Rate Payable

1. Generally

Under 5 U.S.C. § 5551(a), the lump-sum payment is computed on the basis of the employee's rights at separation under all applicable laws and regulations existing at the time which would have affected his pay had he remained in the service for the period covered by the leave. 38 Comp. Gen. 161, 163 (1958). See also FPM Chapter 550, S2-3 and FPM Supp. 990-2, Book 550, S2-3.

2. Statutory pay increases

a. General Schedule

If the employee is separated prior to a statutory pay increase but the period of projected leave extends beyond the effective date of the increase, the lump-sum payment shall be adjusted to reflect the increased rate for any leave from the effective date of the pay increase. 47 Comp. Gen. 773 (1968); B-165201, October 2, 1968.



b. Wage Board employees

For prevailing rate (Wage Board) employees who retire or separate prior to the effective date of a wage increase under 5 U.S.C. §§ 5341-5349, and who receive a lump-sum payment for leave, there may be no retroactive adjustment to the lump-sum payment even if the leave would have extended beyond the effective date of the new wage rate. However, if the employee is on "terminal leave" up to or beyond the date the new wage rate is ordered into effect, his pay may be adjusted to reflect the new wage rates. 54 Comp. Gen. 655 (1975).

The above-cited decision does not apply to those employees whose wages are negotiated under section 9(b) of Pub. L. No. 92-392 (5 U.S.C. § 5343 note). Retroactive wage increases under the authority of section 9(b) are not limited to employees who were in the service of the government on the day the wage increase is ordered into effect. 57 Comp. Gen. 589 (1978), distinguishing 54 Comp. Gen. 655 (1975).

Where a Wage Board employee retires or separates after issuance of an order granting a prospective wage increase but before the effective date of the increase, he is entitled to receive his lump-sum leave payment paid at the higher rate for the period extending beyond the effective date of the wage increase. 59 Comp. Gen. 494 (1980), distinguishing 54 Comp. Gen. 655 (1975).

Where a Wage Board employee retires or separates prior to issuance of an order granting a prospective wage increase but his accrued leave extends beyond the effective date of the increase, he is entitled to receive his lump-sum leave payment paid at the higher rate for the period beyond the effective date of the increase, provided that the order granting the increase is issued prior to the effective date mandated in 5 U.S.C. § 5344(a). 59 Comp. Gen. 494 (1980), distinguishing 54 Comp. Gen. 655 (1975).

The rule in 54 Comp. Gen. 655 (1975) is limited to situations involving retroactive wage increases where the employee retires or separates before the effective date of a wage increase and the order granting the new wage rate is issued after the effective date of the increase. In those situations, the lump-sum leave payment may not be adjusted upward due to the provisions of 5 U.S.C. § 5344(b).

Lump-sum annual leave payments made to prevailing rate employees may be adjusted to reflect the increase in rates of pay commencing after the effective date of Pub. L. No. 96-369, October 1, 1980, only if the employee

performed service after the effective date of the act (October 1, 1980) as required by subsection 114(c) of the act. 61 Comp. Gen. 94 (1981).

3. Step increases

a. Generally

Where prior to date of separation, a General Schedule employee has completed the requisite period of actual service, and has met all other conditions for a within-grade advancement under 5 U.S.C. § 5335, the fact that, because such advancements are not effective until the beginning of the next pay period following completion of the required period of service, the advancement was not actually received prior to separation, would not preclude including it in the computation of the lump-sum payment under 5 U.S.C. § 5551 for leave extending beyond the beginning of the next pay period. 26 Comp. Gen. 102 (1946).

An employee who was separated from federal service by a reduction in force received a lump-sum payment for accrued annual leave. Since the period covered by the lump-sum leave payment is not counted as federal service, the employee may not, upon later reemployment, use the period for determining entitlement to a periodic step increase. 59 Comp. Gen. 15 (1979).

b. Eligibility completed while on leave without pay

Where the employee completed the requisite service for a step increase while on leave without pay in connection with a reduction in force, the step increase would be included in his lump-sum payment even though the employee did not return to a pay status. 27 Comp. Gen. 330 (1947).

c. Eligibility completed while on military furlough

An employee was credited with step increases while on military furlough and resigned without returning to his civilian position. Such step increases should be included in the computation of his lump-sum payment. B-115871, August 24, 1953.

4. Premium pay

An employee's lump-sum payment shall include the premium percentage pay for irregular or unscheduled overtime to which he would have been entitled had he remained in the service for the period covered by his leave. 36 Comp. Gen. 18 (1956) and 38 Comp. Gen. 161 (1958).

An employee who was receiving premium pay for standby duty under the provisions of 5 U.S.C. § 5545(c)(1) is not entitled to such premium pay while on extended sick leave pending disability retirement, and thus is not entitled to include the premium pay rate in his lump-sum payment for leave upon separation. 59 Comp. Gen. 683 (1980).

5. Cost-of-living allowances and foreign differentials

a. Separated at post of duty

If an employee is receiving a cost-of-living allowance or post differential and he is separated at his post of duty, such differential or allowance shall be included in the computation of his lump-sum payment. 52 Comp. Gen. 993 (1973); 32 Comp. Gen. 323 (1953); 29 Comp. Gen. 10 (1949); and 28 Comp. Gen. 465 (1949).

b. Separated away from post of duty

An employee who was separated after leaving his overseas post may not have the post differential or cost-of-living allowance he was receiving included in his lump-sum leave payment since he was not receiving the differential or allowance at the time of separation. 38 Comp. Gen. 594 (1959), 33 Comp. Gen. 287 (1954) and 28 Comp. Gen. 465 (1949).

Where an employee was evacuated from Vietnam to the United States and was no longer receiving post differential, he is not entitled to inclusion of post differential in the computation of the lump-sum payment for accumulated annual leave upon separation from service in the United States. William E. Pope, Jr., B-186046, November 9, 1976.

c. Separated while on temporary duty

An employee who was receiving a cost-of-living allowance returned to the United States for temporary duty and was then separated from federal service after being in an annual leave status for a few days. His lump-sum payment should include the cost-of-living allowance even though he was

separated away from his overseas post if it was in the public interest not to return him to his overseas post for separation. B-155356, November 20, 1964.

6. Reemployed annuitants

While a reemployed annuitant's pay will be reduced by the amount of his annuity, his lump-sum payment upon separation shall be based upon his full pay rate without reduction by the amount of his annuity. 5 U.S.C. § 8344(a). 36 Comp. Gen. 340 (1956) and 36 Comp. Gen. 209 (1956).

7. Nonworkdays and holidays

a. Generally

An employee is not entitled to pay for holidays during the period covered by his lump-sum annual leave payment. 5 U.S.C. § 5551(a). 61 Comp. Gen. 363 (1982).

Employee's claim for night shift differential and holiday pay as part of lump-sum leave payment upon separation is denied. Employee did not qualify for night shift differential at the time of his separation, and language of statute providing for payment of lump-sum leave is clear and unambiguous and specifically excludes holiday pay. Larry R. Taylor, B-252287, May 28, 1993.

b. Inauguration Day

Under the rule in effect prior to December 5, 1980, since Inauguration Day, or the following Monday when the day falls on Sunday, is a holiday for federal employees in the District of Columbia area, under 5 U.S.C. § 6103(c), a former federal employee who was employed in the District of Columbia and who retired with sufficient annual leave to extend through the holiday may have it included in the lump-sum leave payment. 36 Comp. Gen. 478 (1956).

c. Executive order holidays

Under the prior rule, where a holiday is established by executive order, employees who are separated after the date the order was signed are entitled to payment for the holiday which falls within the period covered by their lump-sum payment. Since an executive order is effective when

signed unless otherwise provided, an employee who is separated on the day the order is signed is entitled to the holiday in the computation of the lump-sum payment. 34 Comp. Gen. 254 (1954).

d. Holidays and employees overseas

(1) American citizens—Foreign holidays should not be included in computing lump-sum payments for accumulated annual leave of American employees since there is no authority to close offices or declare such holidays to be nonworkdays for American citizens. B-130233, February 25, 1957.

(2) Local employees—Where it is discretionary rather than mandatory to excuse local employees of the Foreign Service on United States national holidays and local holidays, such holidays may not be included in lump-sum payments due local employees on separation from service. 36 Comp. Gen. 447 (1956).

e. Rotating workweeks

An employee who works a regular rotation schedule should have his lump-sum payment computed on the basis of the workdays, holidays, etc., occurring within the rotative workweek he would have worked had he remained in federal service. 30 Comp. Gen. 508 (1951).

8. Retention allowance—5 U.S.C. § 5754

Employee, who was receiving a 25 percent retention allowance under 5 U.S.C. § 5754, has retired from federal service and requested that the retention allowance be included in his lump-sum leave payment under 5 U.S.C. § 5551 as pay he would have received had he remained in the service until expiration of the period of the annual leave. The claim is denied. A retention allowance is an addition to basic pay in the nature of a bonus for remaining with the agency, payment is discretionary with head of the agency and may be reduced or discontinued at any time, and a reduction or elimination may not be appealed. Payment as lump-sum leave would be inconsistent with the intent of the statute to retain an employee who would otherwise leave government service. Lafayette E. Carnahan, B-249816, March 8, 1993.

## D. Reemployment and Recredit

### 1. Generally

5 U.S.C. § 6306 provides that when an employee has received a lump-sum payment under 5 U.S.C. § 5551 and he reenters the federal service (except for certain positions) before the end of the period covered by the lump-sum payment, he shall refund an amount corresponding to the unexpired portion of the period covered by the lump-sum payment and receive a credit for the corresponding amount of annual leave. See also 5 C.F.R. Part 630, Subpart E; FPM Chapters 550 and 630; and FPM Supp. 990-2, Book 550, S2-4.

### 2. Part-time reemployed annuitant

Employee, grade GS-13, step 9, retired from his position and then was rehired as a part-time reemployed annuitant at GS-12, step 10, before the expiration of the period covered by his lump-sum annual leave payment. Employee is entitled to be paid for lump-sum annual leave at the rate for GS-13, step 9, for the period between retirement and reemployment. After separation from the GS-12 position he is entitled to receive a lump-sum annual leave payment only at the rate for GS-12, step 10. Willis E. Staymates, B-200548, August 12, 1981.

### 3. Transfer to international organization

Employee of Nuclear Regulatory Commission transferred to an international organization under 5 U.S.C. §§ 3581-3584 effective August 16, 1978, at which time he elected to retain annual leave to his credit pursuant to 5 U.S.C. § 3582(a)(4). On January 22, 1980, also pursuant to 5 U.S.C. § 3582(a)(4) and prior to reemployment, employee requested lump-sum payment for annual leave retained. Consistent with computation provisions of 5 U.S.C. § 3583 and implementing regulations, computation of employee's payment is based on rate of pay attaching to his federal agency position at time of his request for lump-sum leave payment under 5 U.S.C. § 3582(a)(4), not the date of the transfer. 60 Comp. Gen. 409 (1981).

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#### 4. Refunds

##### a. Refund required

(1) Temporary position—A refund is required even if the employee is reemployed in a temporary position for less than 90 days. 32 Comp. Gen. 387 (1953).

(2) After erroneous separation—An employee who is restored to duty retroactively after an erroneous separation must refund lump-sum payment for leave, and this payment is a proper setoff against a backpay award. 59 Comp. Gen. 395 (1980) and 57 Comp. Gen. 464 (1978). The erroneous lump-sum payment may be subject to waiver under 5 U.S.C. § 5584 to the extent necessary to avoid a net indebtedness. 59 Comp. Gen. 395 (1980). Prior decisions to the contrary, 55 Comp. Gen. 48 (1975) and B-175061, March 27, 1972, will no longer be followed. See also Cassandra B. Wyatt, B-231943, July 14, 1989.

A terminated employee is entitled to a lump-sum payment for unused annual leave upon separation from service, but must refund the full amount if the separation is subsequently set aside, because there no longer exists any proper basis for the payment. Therefore, recoupment of a lump-sum leave payment is required in the case of an employee who was terminated, but whose termination was subsequently changed to a suspension in arbitration proceedings, since the employee would not have received a lump-sum payment for unused leave if suspension rather than termination had been the original disciplinary action. B-219974, October 21, 1985.

(3) Reemployment under different leave system—Where a Public Health Service officer received a lump-sum annual leave payment upon separation and is reemployed in the civil service before expiration of the period of leave, he shall refund the unexpired portion of the lump-sum payment even though different leave systems are involved. See B-119016, July 20, 1956. Also see 33 Comp. Gen. 209 (1953).

Employee, with accumulated annual leave, resigned competitive position without a break in service to accept presidential appointment to a position exempted from coverage under the Annual and Sick Leave Act of 1951, as amended. He later resigned presidential appointment and, without break in service, was reappointed to competitive position covered by Leave Act. When he was appointed to the exempted position he was not paid for his annual leave balance. The balance was recredited when he was

reappointed to the competitive position. Upon retirement from that position he became entitled to lump-sum payment for annual leave at then-current rate of compensation. See 5 U.S.C. §§ 5551 and 6302(e). Joseph F. Friedkin, B-223225, July 29, 1986.

b. Refund not required

(1) Reemployed under "no leave" system—An employee reemployed in a position which has no annual leave system to which leave can be recredited need not refund any of his unexpired lump-sum leave payment. 33 Comp. Gen. 209, 213 (1953).

(2) Personal leave ceiling—An employee with a "saved" leave ceiling (see 5 U.S.C. § 6304(c)) who resigns in one leave year and is reemployed in the next leave year prior to the expiration of the lump-sum leave payment period shall have his ceiling constructively reestablished by deducting from the previous ceiling the excess over current accrual, if any, of the expired portion of leave covered by the lump-sum payment added to leave actually used during the year. 38 Comp. Gen. 91 (1958).

An employee with a 45-day annual leave ceiling resigned from federal service, received a lump-sum leave payment, and was reemployed 3 years later. Upon receipt of his lump-sum payment for unused annual leave the employee received his full entitlement for his annual leave. Upon re-entry into federal service, he became subject to the 30-day leave ceiling and had no right to have the 45-day ceiling reinstated. 59 Comp. Gen. 352 (1980).

(3) Inclusion of cost-of-living allowance—An employee who is required to refund part of a lump-sum payment shall include any differential or cost-of-living allowance included in the lump-sum payment. B-137579, November 20, 1958.

c. Recredit

The leave of an employee is to be reconstructed as of the date of reemployment, even though the employee is permitted to refund the payment in installments and the agency denies use of the leave represented by the refund until the refund has been made in full. 38 Comp. Gen. 91 (1958).



d. Reemployment prior to payment

Employees who are separated and then reemployed by another agency prior to the processing of the lump-sum leave payment, may be paid for that portion of leave which expired during the interval between employments (less taxes), and have the remaining leave transferred without tax deductions to the new agency. 34 Comp. Gen. 290 (1954); B-121724, April 20, 1971. See also 49 Comp. Gen. 444 (1970).

E. Waiver

An employee, a personnel management specialist, resigned his competitive status position with his agency and accepted an excepted position in another agency without a break in service. He prepared his own SF-52, Request for Personnel Action, noting that lump-sum payment for annual leave was not to be made. Due to an error by the agency's personnel office, he received the lump-sum payment for his annual leave, and he seeks waiver of this erroneous overpayment. The employee's resignation and subsequent reemployment without a separation for one or more workdays does not authorize lump-sum payment of annual leave under 5 U.S.C. § 5551(a) (1982). The overpayment may not be waived under 5 U.S.C. § 5584, since the employee was not without fault in the matter. Frank J. Delano, B-224052, May 11, 1987.

Following a 1-workday break in service, a former employee of the Panama Canal Company, who received a lump-sum payment from the Company for his accrued annual leave, was reemployed by the Department of the Navy. He is required by statute to refund the amount of the lump-sum leave payment he received except the amount covering his 1-day break in service since he was employed in government service during the period covered by the lump-sum payment. The government's claim may not be waived since, even if it is considered as an erroneous payment, the employee is not without fault in the matter. Darell K. Seymour, B-210211, April 11, 1983.

Employee received lump-sum leave payment upon separation because of reduction in force (RIF), which was later found to be improper by court. When employee was reinstated, gross amount of backpay was set off against gross amount of lump-sum leave payment, and additional amounts were deducted from employee's salary up to total of original lump-sum leave payment. Employee sought waiver of repayment of entire lump-sum leave payment. Waiver under 5 U.S.C. § 5584 is granted only to the extent of the net indebtedness; therefore, our Claims Group's partial waiver applied

the proper legal standard. The waiver is, however, modified in amount to reflect corrected computation of backpay.

Following grant of waiver, agency deducted income taxes and Medicare when refunding repayments to employee. Record showed that amounts refunded originally had been collected from employee's after-tax salary. While this Office does not rule on tax questions, which should be resolved between the individual and the Internal Revenue Service, this issue also involves the administration of the Comptroller General's waiver authority. Where, as it was here, amount being refunded had been collected from employee's after-tax salary, it was improper to deduct taxes when the moneys were refunded following waiver. Agency should furnish revised W-2 form and any other necessary documentation so that employee can file amended tax returns or claims for refund of taxes that were improperly collected from waiver refund. Victor Crichton, 66 Comp. Gen. 570 (1987).

A lump-sum payment for unused annual leave which is correctly and legally made to a federal employee upon his separation from government service may not later be considered an "erroneous" payment within the meaning of the statute authorizing waiver of erroneous overpayments of compensation. This is true even though the employee accepts another federal appointment without any awareness that he will then become legally obligated to refund part of that lump-sum leave payment by accepting reemployment. Hence, collection of the employee's resulting debt may not be waived under 5 U.S.C. § 5584. William A. Bonin, B-200327, November 13, 1980.

## F. Terminal Leave

An employee took approved annual leave for all of the next to last pay period of the leave year and for all workdays except the last administrative workday of the last pay period of the leave year and then retired. The lump-sum annual leave payment he received did not include credit for 16 hours of annual leave which had accrued for those two pay periods because the agency deemed it to be the granting of leave on leave in violation of the terminal leave restriction. The leave credit is allowed. Terminal leave occurs when leave is taken after employee has performed his last day of active duty. Since the employee was present for and performed duty on the last administrative workday of the pay period in which he retired, such leave used immediately prior to that day is not violative of the terminal leave restriction. Aurora D. Rives, B-190374, January 20, 1978, distinguished. Emmitt Sheridan, B-223876, June 12, 1987.

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G. Foreign Service Officers

State Department Foreign Service Officers who are receiving a special differential at the time of their separation may have such amount included in their lump-sum annual leave payment. The officers are receiving the pay under statutory authority, and the lump-sum leave payment is computed on the basis of the employee's rights at the time of separation. Furthermore, since the employee's rights vest at the time of separation, there is no authority to place a limitation occurring between the time of separation and the expiration of the period to be considered in determining the amount of the lump-sum leave payment. Foreign Service Officers, 67 Comp. Gen. 351 (1988).

# Sick Leave

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## A. Laws and Regulations

The laws and regulations governing sick leave are contained in 5 U.S.C. §§ 6301-6312, 5 C.F.R. Part 630, FPM Chapter 630, and FPM Supp. 990-2, Book 630.

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## B. Accrual

### 1. Rate

#### a. Full-time employee

A full-time employee earns sick leave with pay at the rate of one-half day or 4 hours for each full biweekly pay period. 5 U.S.C. § 6307(a).

#### b. Part-time employee

A part-time employee earns 1 hour of sick leave with pay for each 20 hours in a pay status. 5 C.F.R. § 630.406. If a part-time employee's hours in a pay status exceed an agency's basic working hours in a pay period, the excess hours are disregarded in computing leave earnings. 5 C.F.R. § 630.202(b).

#### c. District of Columbia firefighters

Members of the Firefighting Division of the Fire Department of the District of Columbia accrue sick leave at the rate of two-fifths of a day for each full biweekly pay period and may be advanced a maximum of 24 days of sick leave with pay in cases of serious illness or disability. 5 U.S.C. § 6307.

#### d. Sick leave—additional compensation

An employee's claim for additional compensation for use of advance sick leave is denied. Sick leave which is advanced and used, but which is not compensated for until after a pay rate increase, may not be compensated for at the higher rate of pay. Leave which is used only has the value of the employee's rate of pay for the pay period in which it is to be charged. Mildred E. Taylor, B-205359, June 28, 1988.

### 2. Entitlement

#### a. Generally

As a general matter, an employee who accrues annual leave under 5 U.S.C. §§ 6301-6312, also accrues sick leave. See the cases set forth in Chapter 2 of this title, "Annual Leave," "B. Accrual."

b. While receiving disability compensation

See B-180010.12, March 8, 1979; B-189531, September 14, 1977; and cases set forth in Chapter 2 of this title, "Annual Leave," "B. Accrual."

c. Lump-sum payment

An employee who served nearly 5 months on a temporary appointment sought reimbursement for his accumulated sick leave. Unused sick leave may be credited towards service upon retirement or it may be reccredited to the employee if reemployed within 3 years from separation. However, there is no authority for lump-sum payment of sick leave. B-190152, November 30, 1977. See also B-199477, May 3, 1982.

Editor's note: The 3-year limit has been removed for those returning to federal service on or after December 2, 1994. See 5 C.F.R. § 630.502(b) and (c) (1995).

C. Transfers and  
Reemployment

1. Transfers

a. Between positions under 5 U.S.C. §§ 6301-6312

When an employee transfers between positions under 5 U.S.C. §§ 6301-6312, the agency from which he transfers shall certify his sick leave account to the employing agency for credit or charge. 5 C.F.R. § 630.502(a).

b. Between different leave systems

Sick leave to the credit of an employee who transfers between positions under different leave systems without a break in service shall be transferred to his new employing agency on an adjusted basis under regulations prescribed by OPM. 5 U.S.C. § 6308. See also 5 C.F.R. § 630.502.

c. Agricultural Stabilization and Conservation Service (ASCS) employees

Under 5 U.S.C. § 6312, an employee who transfers without a break in service between the Department of Agriculture and an ASCS county committee may transfer his annual and sick leave balances to the new position. Furthermore, the leave balances transferred from county committee service are treated as earned in federal employment if the employee later transfers to another agency. 48 Comp. Gen. 486 (1969).

Where the record is clear that the Department of Agriculture intended to transfer an ASCS county committee employee to a civil service position without a forfeiture of accumulated sick leave, the agency may correct the employee's records to reflect a transfer without a break in service. A 19-day break in service may be changed to authorized leave of absence without pay since forfeiture of sick leave in this case would be in direct contravention of clear statutory mandate to avoid forfeiture during such transfers. B-191014, March 10, 1978.

ASCS county committee employee (a nonfederal position) who was separated in reduction in force during 1975 and subsequently received an appointment with the Forest Service, sought to have her unused sick leave recredited. She was properly denied credit for unused sick leave. Under 5 U.S.C. § 6312, county committee employees may have leave balances transferred under 5 U.S.C. § 6308. That section authorizes credit for unused leave balances only where employees transfer between positions under different leave systems without a break in service. B-199806, September 29, 1981.

d. Commissioned officers of Public Health Service

Commissioned personnel of the Public Health Service are considered civilian officers and employees under 5 U.S.C. §§ 6301-6312. Thus, members transferring to and from the commissioned corps to other civilian positions are not entitled to a lump-sum payment but may have their annual and sick leave transferred on an adjusted basis. 34 Comp. Gen. 287 (1954).

e. District of Columbia teachers

District of Columbia Teachers' Leave Act of 1949 is essentially a sick leave act. Therefore, under 5 U.S.C. § 6308, a federal employee, who, without a break in service, transfers to a position under the District of Columbia Teachers' Leave Act, may transfer sick leave upon an adjusted basis in accordance with regulations prescribed by CSC. However, no annual leave may be transferred. 33 Comp. Gen. 209 (1953).

f. Legal Services Corporation

Employees who resigned from federal employment and accepted employment with federally funded Legal Services Corporation were paid bonuses equal to a portion of accrued annual and sick leave. Employees

may have sick leave balances certified for retirement purposes or for possible recredit since by statute employees of the Legal Services Corporation are not federal employees for leave purposes. B-186449, January 24, 1977.

g. Senior Executive Service to presidential appointment

An agency failed to advise a career Senior Executive Service (SES) member prior to receiving a presidential appointment to a Executive level IV position that he could elect to continue receiving annual and sick leave or other SES benefits during his presidential appointment, as provided in 5 U.S.C. § 3392(c). As a result of the agency's failure to properly counsel the employee, the employee placed his annual and sick leave balance in abeyance and did not elect to retain leave benefits for a period of 4 years. We conclude that the agency's failure to properly advise the employee constituted an unwarranted personnel action and that the annual and sick leave the employee would have earned during this period may be retroactively restored. Anthony J. Calio, 66 Comp. Gen. 674 (1987).

2. Reemployment after break in service

a. Generally

An employee who is separated from the federal government or the government of the District of Columbia is entitled to a recredit of his sick leave if he is reemployed in the federal government or the government of the District of Columbia, without a break in service of more than 3 years. 5 C.F.R. § 630.502(b)(1).

Editor's note: The 3-year limit is no longer in effect for those whose leave has not been forfeited and who return to federal service on or after December 2, 1994. 5 C.F.R. § 630.502(b) and (c) (1995).

A NASA employee who resigned his position to accept employment with a Congressional committee is entitled to recredit of his sick leave balance if he is reemployed within 3 years from the date of separation. John L. Swigert, B-191713, May 22, 1978.

An employee who had a break in federal service of more than 3 years may not receive a recredit of sick leave on the basis that he was prevented from earlier reinstatement by the imposition of a federal hiring freeze, and by the agency's delay in completing his required background investigation.

The employee's unused sick leave may not be recredited since under 5 C.F.R. § 630.502(b)(1), recrediting of sick leave is permitted only when an employee's break in service does not exceed 3 years. Neither this Office nor the agency concerned may waive or grant exceptions to that regulation, which has the force and effect of law. Recredit of Sick Leave of FBI Employee After Break in Service, B-209068, January 20, 1983.

b. Appointment after 3 years

A federal employee, who was separated from federal service on January 23, 1970, was offered reemployment within 3 years. However, because of a hiring freeze he was not appointed until after 3 years from his separation date. He may not be recredited with sick leave earned during prior service. OPM regulations, contained in 5 C.F.R. § 630.502(b)(1), provide that a separated employee may be recredited with sick leave only if the break in service is 3 years or less. B-180604, April 9, 1974. See also B-188913, October 17, 1977.

c. What constitutes "break in service" temporary appointment

An employee served under several temporary appointments on a when-actually-employed basis between his voluntary separation in 1953 and his reemployment in 1956. Although he does not accrue leave during a when-actually-employed appointment, he is entitled to recredit of sick leave accumulated prior to his separation in 1953 upon his reemployment in 1956. The term "break in service" in 5 C.F.R. § 630.502(b) refers to actual separation from the federal service. 47 Comp. Gen. 308 (1967).

d. Congressional employment

GAO employee resigned and worked more than 3 years with Congressional committee before he was employed by NASA. Sick leave which could not be transferred or used during congressional employment may be recredited to position at NASA since congressional employment does not constitute "break in service" under 5 C.F.R. § 630.502. 59 Comp. Gen. 704 (1980).

e. Peace Corps volunteer service

An employee with 568 hours of sick leave resigned December 3, 1965, to train and serve as a Peace Corps volunteer. The employee who was reemployed July 6, 1970, contends that volunteer service should be



considered federal service for the purpose of extending the 3-year limit within which sick leave may be recredited after a break in service. However, 22 U.S.C. § 2504(f) may not be considered as authorizing the counting of volunteer service to suspend the 3-year break-in-service rule. B-175209, August 14, 1972.

f. Organizations which receive federal funding

Employee who had a break in federal service of over 3 years seeks recredit of sick leave on basis that he was employed by various organizations and instrumentalities that receive federal funding. Employee contends that such employment avoids a break in service in excess of 3 years. Under 5 C.F.R. § 630.502(b), a recredit of sick leave is permitted when an employee's break in service does not exceed 3 years. Since service with private organization or state instrumentalities that receive federal funding does not constitute federal service, employee may not have sick leave recredited. 61 Comp. Gen. 83 (1981).

g. Transfer or detail to international organization

An employee who resigned to work for an international organization requested restoration of sick leave upon his subsequent reemployment. Under 5 U.S.C. § 3582, an agency is required to restore the sick leave only if an employee was transferred or detailed to an international organization. Hence, the sick leave may not be restored since the employee was not transferred or detailed to the international organization but rather resigned to accept that position. Neither may the leave be restored under 5 C.F.R. § 630.502(b) since service with an international organization does not constitute federal service for the purpose of 5 U.S.C. §§ 6301-6312 and the employee's break in service exceeded 3 years. B-180857, August 27, 1974.

h. Service as substitute teacher in District of Columbia

Substitute teachers employed by the District of Columbia government do not earn sick leave under the District of Columbia Teachers' Leave Act of 1949, 31 D.C. Code, § 691, nor under 5 U.S.C. §§ 6301-6312. However, service as a substitute teacher in the District of Columbia is service for the purpose of recrediting sick leave under 5 C.F.R. § 630.502(b) after a separation from federal service. Accordingly, a former substitute teacher reemployed by HEW within the applicable time limit, is entitled to recredit

of sick leave earned as a federal employee prior to his substitute teaching. 54 Comp. Gen. 669 (1975).

i. Reemployment after military service

Federal civilian employees who leave their positions to pursue military careers are eligible under regulation for a recredit of their civil service sick leave after their retirement from military service, if they are reemployed in a civilian capacity by the government within the following 3 years. Hence, an individual who left civil service employment when called to active military duty, and who was subsequently retired from military service after completing 20 years' active duty, may be allowed a recredit of his civil service leave balance upon his reemployment as a civilian 1 year later. The fact that he had a 2-month break in service during his military career is immaterial, since only a break in service in excess of 3 years could have operated to extinguish his leave restoration rights. Roberto De La Cruz, 65 Comp. Gen. 430 (1986).

3. Evidence to support claim

a. Generally

The crediting of sick leave is primarily an administrative matter, and the employing agency must determine the acceptability of any secondary evidence presented and whether it may be used as a basis for crediting the leave claimed. Examples of supporting evidence which might be considered sufficient would include Time and Attendance Reports, Leave and Earnings Statements, personal leave records, or certificates of former supervisors or timekeepers indicating leave earned and used during the period. B-189288, November 23, 1977. See also 58 Comp. Gen. 741 (1979).

Certifications of leave credits based upon other than official records are normally not to be sanctioned. However, in lieu of a certification, where no official records are available, there should be furnished statements of any other evidence which may be available in respect of employee's leave credits, including an estimate of his leave credit, if possible. Any such statements should clearly reflect the factors forming the basis of the estimate. The agency where the employee currently is employed may then determine whether, upon the basis of such showing, a credit of leave may be made. 32 Comp. Gen. 310 (1953). See also Mark Radke, B-212670, January 17, 1984, involving annual leave as well as sick leave.

b. Sworn statements

Unused sick leave of an employee who was inducted into the Army may be recredited upon his reemployment after retirement from the military service. The statement of the Letterkenny Army Depot and the statement of the National Personnel Records Center that they have no record of the employee's sick leave balance at the time he entered the military would not preclude the acceptance of secondary evidence to support his claim for recredit. Accordingly, statements furnished by officers and employees who have knowledge of facts and circumstances existing at the time of his induction may be used. B-164220, September 5, 1968.

c. Officially approved leave requests

Where an employee's leave records have been destroyed an agency may accept as evidence of leave usage the officially approved leave requests and the employee's affidavit attesting that such leave requests represent the only sick leave that was used for the period involved. B-175742, June 20, 1972.

4. Merger of leave systems

An employee, who earned leave under the leave acts of 1936 or any other leave system merged under 5 U.S.C. §§ 6301-6312, is entitled to a recredit of that leave under those sections if he would have been entitled to recredit for it on reentering the leave system under which it was earned. However, this section does not revive leave already forfeited. 5 C.F.R. § 630.503.

D. Administration of Sick Leave

1. Generally

The granting of sick leave in accordance with the controlling regulations is an administrative responsibility. The nature of the evidence required to determine whether an employee was incapacitated must of necessity be left to administrative determination, bearing in mind the possibility of abuse. FPM Supp. 990-2, Book 630, S4-2b(1).

An agency shall grant sick leave to an employee when the employee:

- receives medical, dental, or optical examination or treatment;
- is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement;

- is required to give care and attendance to a member of his immediate family who is afflicted with a contagious disease; or
- would jeopardize the health of others by his presence at his post of duty because of exposure to a contagious disease. 5 C.F.R. § 630.401.

Editor's note: See 5 U.S.C. § 6307, amended September 30, 1994, and 5 C.F.R. § 630.401(a) (1995) for current coverage for care of family member, purposes relating to death of family member, and adoption of a child.

Unless an agency establishes a minimum charge of less than 1 hour or establishes a different minimum through negotiations, the minimum charge for sick leave is 1 hour. 5 C.F.R. § 630.206(a).

## 2. Granting

### a. Agency discretion

During a period when 3,000 air traffic controllers reported themselves disabled for duty, an air traffic controller who was absent for 2 weeks alleged that his absence was due to the effects of drugs prescribed by a physician designated by the Federal Aviation Administration. Claimant states that pursuant to regulations, prescribed drugs were incapacitating for traffic control duty and, therefore, he should have been carried on sick leave rather than an absent without leave status. Absent a showing of arbitrary or capricious action, GAO is generally without authority to overturn administrative action by which sick leave is refused or employee is placed in an absent without leave status. B-170730, August 16, 1971.

It was within the discretion of the appropriate officials of the Defense Investigative Service to decide that one of its employees who requested sick leave was entitled to it, based on evidence that the employee was absent due to a severe physically incapacitating emotional injury following the death of his wife. Michael J. DeLeo, B-207444, October 20, 1982.

### b. First 40-hour employees

National Aeronautics and Space Administration employees assigned to a first 40-hour workweek under 5 C.F.R. § 610.111 contend that local regulations governing their use of sick leave, which permit their supervisor to retroactively determine that a day on which they were sick may be accounted for as a nonworkday, are contrary to law and CSC regulations. Inasmuch as the local regulations could be applied to deprive employees

of the use of sick leave, the local regulations are inconsistent with CSC regulations and, therefore, must be amended. B-171947.48, July 9, 1976.

c. Contagious disease

An employee may be granted sick leave to care for a member of his immediate family who is ill at home with a disease requiring isolation, quarantine, or restriction of movement for the period required by local health regulations or, in absence thereof, in accordance with a period specified in a physician's certificate. 36 Comp. Gen. 183 (1956).

An arbitrator granted sick leave to an employee who attended a sick member of his family not afflicted with a contagious disease. The award may not be implemented by the agency since there is no legal authority to grant sick leave under these circumstances. 55 Comp. Gen. 183 (1975).

Employee who was away from work in order to provide care and assistance for his seriously ill son claims sick leave should be granted instead of the annual leave granted by the agency. Employee may be granted sick leave only if the son's illness is contagious and his movement is restricted by the health authorities. 5 C.F.R. § 201(b)(3). Since the son's illness is not contagious and his movement was restricted because of the nature of the illness and not because the health authority restricted movement to prevent spread of a contagious illness, the employee may not be granted sick leave. Matter of Lawrence J. Chandler, B-250175, January 6, 1993.

An employee residing in Alaska claims sick leave for the time he remained at home to care for his child who was suffering from conjunctivitis. The governing regulations allow sick leave when an employee is required to attend to an immediate family member with a contagious disease. 5 C.F.R. § 640.401(c) (1988). They define such a disease as one for which public officials require the child to be quarantined, isolated, or restricted in movement for a specified period. Since in this case a state public health official stated that conjunctivitis would preclude the child from attending the day care facility while the child was exhibiting the disease's acute symptoms, the child's freedom of movement was substantially restricted and agency allowance of sick leave would be appropriate. Morton Forsko, B-238784, June 15, 1990.

d. Prepared childbirth

An employee, who was present at the delivery of his child in accordance with the Lamaze method of prepared childbirth, claims sick leave should be substituted for annual leave granted by the agency. Sick leave is appropriate only when the circumstances specifically meet the criteria contained in the regulations. See 5 C.F.R. § 630.401. Thus, sick leave may not be allowed since the employee did not undergo medical treatment and he was not incapacitated for duty as required by regulations. B-195042, August 6, 1979, citing 55 Comp. Gen. 183 (1975).

e. Treatment by marriage/family counselor

Employee requested sick leave for period of emotional stress while she was under the care of a licensed marriage/family counselor. Since such a counselor is considered a "practitioner" who may certify the employee's incapacitation to work, the agency may grant the use of sick leave. B-201099, December 22, 1981.

f. During erroneous separation

An employee was restored to duty and awarded backpay for the period of her erroneous separation, including a period during which she was incapacitated by illness. Backpay may not be awarded for a period of incapacity when an employee is not ready, willing, and able to perform the duties of the former position. However, where the employee has accumulated sick leave, the period of incapacity may be charged to sick leave upon restoration to duty. 46 Comp. Gen. 139 (1966).

g. Criminal confinement

The incapacity of an employee to perform his duties because of confinement to a mental hospital for treatment or diagnosis would appear to be a case in which sick leave could properly be granted. However, where an employee was unavailable for performance of duties because he was confined as a result of a criminal conviction, the employee was not incapacitated for any of the reasons set forth in the regulations. Therefore, the agency's determination not to grant sick leave was correct and there is no basis for his retroactive reinstatement to the rolls for the purpose of granting 264 hours of sick leave. B-176645, November 1, 1972.

h. Supporting evidence

An agency may grant sick leave only when supported by administratively acceptable evidence. Regardless of the duration of the absence, an agency may accept an employee's certification as to the reason for his absence. However, for an absence in excess of 3 workdays, or for a lesser period when determined necessary by an agency, the agency may also require a medical certificate, or other administratively acceptable evidence as to the reason for the absence. 5 C.F.R. § 630.403.

i. Personal certification

Where, due to a scarcity of physicians or other practitioners in a particular locality, an employee is unable to procure a physician's certificate to support his application for sick leave for a period of more than 3 days' duration, as required by the regulations, it is within the agency's discretion to grant the employee sick leave on the basis of his personal certification. 23 Comp. Gen. 186 (1943).

3. Advance leave

a. Generally

In cases of serious disability or illness, a maximum of 30 days sick leave with pay may be advanced to the employee. 5 U.S.C. § 6307(c). An employee serving under a limited appointment or one which will be terminated on a specific date, may be advanced sick leave only up to the total amount he would otherwise earn during the term of his appointment. 5 C.F.R. § 630.404.

b. Administrative determination

An agency's decision not to grant an employee advance sick leave and to place him on leave without pay for absences from work after he applied for disability retirement is sustained. The authority to grant or refuse a request for advance sick leave is exclusively within the jurisdiction of the agency. B-182085, December 24, 1974.

The granting of advance sick leave is normally a matter within the discretion of the agency. However, where an employee of the IRS requested 30 days of advance sick leave, but her request was denied based on the assumption that she would not return to duty, the IRS may retroactively grant the employee advance sick leave after her return to duty if the

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agency determines its original action constituted an unwarranted or unjustified personnel action under the Back Pay Act, 5 U.S.C. § 5596. B-187171, June 7, 1977.

Employee claims backpay for period before disability retirement when agency terminated advance sick leave and placed employee on leave without pay pending retirement. Advance sick leave may be granted at the discretion of employing agency. Hence, agency's decision to terminate advance sick leave and to place employee on leave without pay for absences from work after employee applied for disability retirement will not be disturbed. B-199114, April 28, 1981.

c. Liquidation of advanced leave

An employee injured on the job in 1964, elected to receive employees' compensation until he resigned. Since it was not clear at that time that the resignation was based on medical factors, annual leave of 75 hours was used to offset an equal number of hours of advanced sick leave. The voucher for 75 hours of annual leave may be paid, since under 5 C.F.R. § 630.209(b), an employee is not required to refund an amount equal to any unliquidated advanced sick leave if he resigns or retires because of disability. B-174466, December 27, 1971.

Prior to voluntary retirement, an employee had been advanced 240 hours of sick leave. After he retired, the money equivalent of advanced sick leave was collected back from his accrued annual leave and by setoff from his retirement fund. In view of evidence that the employee was disabled at the time of retirement, the employing agency may refund money equivalent of advanced sick leave since under 5 C.F.R. § 630.209(b) an employee is not required to refund unliquidated advanced sick leave if he resigns or retires on disability. B-188903, July 6, 1977.

An employee who was advanced sick leave may, with administrative approval, refund the value of the advanced sick leave she has taken and be placed in leave without pay status for the period involved. B-189531, September 14, 1977; and 29 Comp. Gen. 76 (1949). But see 5 C.F.R. § 630.208(d) holding that the period is not a nonpay status.



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4. Change of separation date for purpose of granting sick leave

a. Generally

5 U.S.C. § 6307 provides for the granting of sick leave to employees on the rolls and not to former employees separated by retirement, resignation, or otherwise. Separated employees may not be restored to rolls for the purpose of taking sick leave unless there was a bona fide administrative error in fixing the employee's separation date. B-180436, February 13, 1975.

A claim by a civilian employee with Department of the Navy for payment of sick leave accumulated at the date of his separation, based on an apparently bona fide medical determination by a Navy medical authority that the claimant was capable of performing the duties of his position subject to certain limitations, is disallowed. There is no statutory authority for reimbursing an employee for sick leave not used prior to his separation. An employee cannot be restored to his former position solely to be granted unused sick leave, unless there was a bona fide administrative error in effecting separation. Further, disability retirement approved retroactively does not invalidate an otherwise proper action taken by the Navy Department. B-162628, December 27, 1967. See also B-199477, May 3, 1982.

An employee committed suicide approximately 2 months after his voluntary resignation. Although the employee's initial memorandum presented the agency with the alternative of granting leave or accepting his resignation, subsequent documents show that the employee intended resignation. The separation date may not be changed for the purpose of granting sick leave, annual leave, and leave without pay until the employee's death because such date may not be changed in the absence of a violation of regulation or a bona fide administrative error in effecting the separation. B-189895, November 2, 1977.

The movement of a former employee's resignation date 6 months forward to the date of his death in order to permit payment of accumulated sick leave, life insurance benefits, and a survivor's retirement annuity to his widow, may not be allowed. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no evidence of administrative error or violation of policy or regulation which would warrant a change in the employee's separation date. Although the widow states that her husband would not have intended to resign had he known

of his illness, that does not establish contrary intent sufficient to change his separation date. Although the widow also suggests that the illness reduced her husband's capacity to make a responsible decision regarding his resignation, in the absence of a judicial adjudication of incapacity, we must presume that the employee had the legal mental capacity to discharge his rights and obligations. Kenneth A. Gordon, 62 Comp. Gen. 620 (1983).

b. Administrative error

An employee, who was carried on sick leave from February 20, 1968, until January 4, 1969, may have annual leave substituted for 136 hours of sick leave. The employee had requested annual leave for the period December 22, 1968, through January 4, 1969, which was granted but through administrative error was charged on leave records as sick leave. Since additional sick leave would have been granted prior to his retirement for disability, the employee should be restored to the rolls and the separation date extended for that purpose. B-170896, October 22, 1970.

An employee resigned from the Department of the Army with 222 hours sick leave to her credit and was employed by the National Labor Relations Board 2 years later. Through an administrative error she was not credited sick leave until after her separation due to confinement for pregnancy which required the use of annual leave and leave without pay. She may have sick leave substituted for the period during which annual leave and leave without pay was used. CSC regulations provide that a person restored to federal employment within 3 years after separation is entitled to recredit of sick leave, and the record shows that the absence would have been charged to sick leave had information been furnished, the non-availability of which was due to administrative error. B-159606, July 26, 1966.

c. Violation of agency policy

An employee, involuntarily removed from service on July 23, 1965, for absence without leave, was notified by CSC in 1966 that his application of February 1, 1965, for disability retirement had been approved. The employee should be given an opportunity to use his forfeited sick leave by restoration to the rolls with proper adjustments for that purpose, since the FPM provides that a definite duty rests with an agency not to separate an ill employee, if he has the necessary service to qualify for disability retirement. If he is unable to work, the agency should carry him in a leave

status (with or without pay) until notification by the CSC's action on his application. 39 Comp. Gen. 89 (1959); B-162875, December 19, 1967; and 61 Comp. Gen. 363 (1982).

A claim for payment for the sick and annual leave accrued as of an employee's retirement date on the basis that the subsequent approval of his disability retirement proves that the physician's pronouncement of his fitness for duty was erroneous, and that he could have been granted all of his leave prior to separation had the agency allowed his disability retirement is disallowed. The employee may not be reimbursed for sick leave not granted prior to his separation or be restored to the agency rolls for the purpose of granting such leave absent an error or violation of a regulation in effecting the separation. The employee was not refused leave prior to his optional retirement; rather he elected to be separated effective April 30, 1968, to be eligible for a 3.9 percent cost-of-living allowance. B-167973, October 13, 1969.

d. Intent of parties

A chest X-ray incident to an employee's separation indicated no abnormality nor a need for additional X-rays. However, an X-ray taken incident to a reemployment examination 4 days after his retirement revealed carcinoma of the lung requiring surgery. The agency does not deny the likelihood of error which would taint the otherwise valid processing of the retirement and render the separation ineffective as being contrary to the intent of both parties. Accordingly, the employee should be restored to the rolls for the purpose of allowing him to exhaust his accrued sick leave. B-175201, July 2, 1972.

An employee, who was separated from the service because of pregnancy prior to the termination of her accumulated sick leave which had been administratively approved on the basis of a timely application supported by a doctor's certificate, is entitled to corrective action to show her separation at the termination of sick leave since that was originally intended by both parties. B-116468, October 5, 1953. See however, B-199477, May 3, 1982, where a request to use or be paid for 44 hours of sick leave was denied upon employee's resignation following 18-month absence for maternity leave.

e. Sick leave used in computation of annuity

An employee who alleges that she was advised by her agency to apply for involuntary retirement to facilitate the processing of the application and to apply for disability retirement after her involuntary retirement was approved was, thus, unable to use 273 hours of sick leave. She requests that her separation date be changed so that she may be restored to the rolls for the purpose of exhausting her sick leave. However, the 273 hours of sick leave were used in the computation of her annuity. Thus, 5 C.F.R. § 630.407 prohibits the recredit of sick leave to her account for use even if her separation date were changed. B-183551, November 28, 1975.

Unused sick leave may be credited towards service upon retirement or it may be recredited to employee if reemployed within 3 years from separation. However, there are no provisions which allow for a lump-sum payment for unused sick leave upon resignation. B-201773, March 4, 1981. See also B-199477, May 3, 1982.

5. Substitution of sick leave

a. For annual leave

(1) General rule—An employee who was entitled to use sick leave specifically requested that such time be charged to annual leave. After annual leave is granted, an employee may not thereafter have such leave charged to sick leave and be recredited with the amount of annual leave previously charged for the purpose of a lump-sum payment upon separation for retirement. 54 Comp. Gen. 1086 (1975); and B-182804, March 29, 1976.

A Navy employee requested and was granted annual leave in connection with his hospitalization and recuperation in October and November 1973. However, after enactment of Pub. L. No. 93-181, December 14, 1973, 87 Stat. 705, by which the limit on a lump-sum leave payment for annual leave was removed, and apparently after his decision to retire in December 1973, he requested that sick leave be substituted for the annual leave so taken. The request may not be granted, since such substitution involves a change in a vested statutory right and such changes are not authorized absent a provision in a statute or regulation providing therefor. B-181087, June 21, 1974.

An employee who was entitled to use sick leave specifically requested that annual leave be charged instead. Subsequently the employee desired to

retroactively substitute sick leave for the annual leave charged. Once annual leave is granted, an employee may not thereafter have such leave charged to sick leave and be recredited with the amount of annual leave previously charged. See B-191327, November 8, 1978, citing 54 Comp. Gen. 1086 (1975); and B-181087, June 21, 1974. Section 6304(d)(1) of Title 5, U.S. Code, does not allow the retroactive substitution of sick leave for annual leave because an employee, with the aid of hindsight, realized that his choice of leave was injudicious. B-193431, August 8, 1979; and B-190662, July 7, 1978.

An employee timely requested and had approved the use of 72 hours of annual leave at the end of a leave year in order to avoid forfeiture. Shortly thereafter, the employee was involved in a non-job-related accident and went on sick leave. Due to a lengthy recuperation period, the employee requested that a portion of the absence be charged to the annual leave subject to forfeiture, rather than sick leave. Such request was granted. In June or July of the succeeding leave year, the employee requested retroactive substitution of sick leave for the excess annual leave used at the end of the preceding leave year. The request is denied. After annual leave is granted in lieu of sick leave as a matter of choice, thereby avoiding forfeiture of that leave at the end of the leave year under 5 U.S.C. § 6304, the employee may not thereafter have sick leave retroactively substituted for such annual leave and have that annual leave recredited solely for the purpose of enhancing the lump-sum leave payment upon separation for retirement nearly a year later. Virginia A. Gibson, 65 Comp. Gen. 608 (1986).

(2) Exception—In Lindsey v. United States, 214 Ct. Cl. 574 (1977), the Court of Claims considered the claim of an employee who requested and was granted annual leave for a period of incapacity in order to prevent a possible forfeiture of annual leave. Later that calendar year the employee elected to retire, and he requested that the sick leave be retroactively charged for the period in lieu of the annual leave previously requested and granted since the annual leave could be included in his lump-sum payment, while the fractional month credit for sick leave gave him no benefit for retirement purposes. The court held that when an employee seeks leave substitution to be compensated for all his accumulated annual leave in the same year of his retirement, substitution of sick for annual leave is allowable.

The court, although limiting its holding to the specific facts of the case, suggested that GAO review its leave substitution policy. In light of the

Lindsey decision, where an employee retires or dies during the same year in which the leave is taken, and a timely request is made, agencies may allow retroactive leave substitution in their discretion depending upon the circumstances of each case. Prior decisions to the extent they are inconsistent will no longer be followed. 57 Comp. Gen. 535 (1978).

However, cases which do not present the special circumstances as set forth in Lindsey and 57 Comp. Gen. 535 (1978) will be governed by the general rule as set forth above. B-193431, August 8, 1978; and B-190662, July 7, 1978.

(3) Administrative error—An administrative error in charging part of a period of sick leave prior to an employee's death as annual leave is substantiated by documents which establish that sick leave applications were properly certified and presented and that no application for annual leave was submitted. Therefore, the voucher covering payment for the annual leave recredited to the account of the deceased employee may be certified. B-123655, December 6, 1955.

Upon review of an employee's accumulated annual leave pending his retirement on February 28, 1969, it was administratively decided, without consulting the employee, to show him in an annual leave status from December 12, 1968, through January 20, 1969, which resulted in the employee using 24 hours of annual leave in excess of his current accrual. Because the employee was unable to work during this period and had unused sick leave to his credit, his request that 24 hours of annual leave charged for January 16, 17, and 20 be changed to sick leave is approved. Since the timing of the charge to annual leave was not his, but was an administrative decision, the payment for 24 hours of annual leave charged him in error is authorized. B-166841, July 16, 1969. See also 31 Comp. Gen. 524 (1952).

(4) Workers' Compensation—buy back—An employee, who used annual leave instead of sick leave based on the incomplete advice received from the agency personnel office, may retroactively substitute sick leave for annual leave to avoid forfeiture of the annual leave in a workers' compensation leave buy-back situation. Prior decisions [Edmond Godfrey, 62 Comp. Gen. 253 (1983); Robert W. Lockridge, B-193431, August 8, 1979; Betty J. Anderson, B-182608, August 9, 1977; and Eugene W. Whitwam, 54 Comp. Gen. 1086 (1975)] distinguished. Gilbert J. Ramos, B-233945, February 24, 1989.

b. For leave without pay

(1) Generally—5 U.S.C. § 6307 provides for the granting of sick leave only to employees on the rolls and not to former employees who have been separated by retirement, resignation, or otherwise. Separated employees may not be restored to the rolls for the purpose of substituting sick leave for leave without pay unless there was an administrative error in fixing their separation date. B-180436, February 13, 1975.

A retired federal employee seeks the substitution of bought-back sick leave for leave without pay (LWOP) for the period he spent on LWOP pending a decision on his workers' compensation application. Where the employee retired during the same year in which the LWOP was taken, and his request for the leave substitution was timely made, we conclude that the employee's agency may, in its discretion consistent with normal sick leave considerations, allow the retroactive substitution of his bought-back sick leave for his LWOP. Larry L. Van Eerden, 63 Comp. Gen. 291 (1984).

After separation from his employment with the government, a former employee seeks to have a portion of his period of leave without pay (LWOP) converted to sick leave because he was not previously informed that the sick leave might be available to him while he held outside employment. We hold that sick leave may not be substituted retroactively after separation in the absence of a bona fide error or violation of a regulation governing the employee's separation. Marion R. Clark, 67 Comp. Gen. 565 (1988).

(2) Administrative error—The estate of an employee, who died while on leave without pay in which he was placed while too ill to report for duty following a furlough, despite sick leave to his credit, may be compensated for such sick leave since the agency reports that the employee would have been placed on sick leave at time of his recall to duty except for an administrative error. B-130418, February 28, 1957.

(3) Unjustified or unwarranted personnel action—An employee of the IRS requested 30 days advanced sick leave, but her request was denied because it was assumed she would not return to duty. Upon her return to duty she sought a retroactive grant of the advanced sick leave and substitution of the sick leave for leave without pay. If the agency, upon review, should find that the original denial was an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, corrective action may be taken. B-187171, June 7, 1977.

(4) Following maternity leave—An employee who resigned following 18-month period of maternity leave may not be compensated for 44 hours of accumulated sick leave. The employee may not be restored to the rolls to grant the leave in the absence of an error or a violation of regulations, and the leave may not be paid lump-sum. B-199477, May 3, 1982.

(5) While in nonpay status—An employee, who was in a nonpay status at the time he became ill and continued in such status throughout the period of his illness, may not be granted sick leave. Absence with pay is synonymous with an active duty status. If there are no duties for the employee to perform and he is in a nonpay status it would be improper to terminate the nonpay status primarily for the purpose of placing the employee in a sick leave status. B-122201, January 7, 1955.

(6) Sick leave used in computation of annuity—An agency placed an employee in an absent-without-leave status when she refused reassignment and took leave, claiming sickness. Request for recredit of sick leave is denied since pursuant to 5 C.F.R. § 630.407, sick leave used in the computation of an annuity may not be substituted for leave without pay. B-181500, April 2, 1975.

(7) Following illness—Upon reconsideration we sustain our prior decision that an employee, who received advanced sick leave, was properly paid for that leave. The advanced sick leave was substituted for leave without pay only during pay periods following the employee's illness. Reconsideration of Mildred E. Taylor, B-205359.2, July 14, 1989.

## 6. Involuntary sick leave

### a. Incapacitated for performance of assigned duties

An employee who performed duties for which the agency required safety goggles was placed on involuntary sick and annual leave after a medical determination that, due to a vision impairment, he should not be required to wear safety goggles. His sick leave may not be restored since an employee may be involuntarily placed on sick leave when the cognizant administrative officials determine, based upon competent medical evidence, that the employee is incapacitated for the performance of his assigned duties. B-193559, April 27, 1979. See also B-186197, July 28, 1976; B-181313, February 7, 1975; and B-206544, July 7, 1982.



An employee who was placed on involuntary sick leave after an agency physician found there were limiting conditions to the employee's continued employment in his assigned position is not entitled to backpay and recredit of sick leave since an agency may place an employee on involuntary sick leave when medical evidence indicates that he is incapacitated for performance of his assigned duties. Jack L. Hamilton, 63 Comp. Gen. 372 (1984).

Former air traffic controller was placed on involuntary sick leave pending his placement into second career training program and eventual retirement on disability. The employee is entitled to restoration of the involuntary sick leave since the determination to place him on sick leave was not based on competent medical evidence, and was contrary to agency procedures. Paul C. Smith, B-218666, April 29, 1986.

U.S. Park Policeman injured in the performance of duty and assigned to light duty for 4 hours a day continues in a pay status for and accrues leave based on a full 8-hour workday under 5 U.S.C. § 6324. When that officer requests a week of annual leave, he should be charged 40 hours rather than 20 hours of annual leave. Section 6324 does not preclude the charging of annual or sick leave for absences unrelated to the injury which occurred in the performance of duty. U.S. Park Police, 66 Comp. Gen. 353 (1987).

b. Employee ready, willing, and able to perform

An employee was placed on sick leave without his consent while an agency action for his involuntary disability retirement was being processed. The retirement was later rejected by CSC for failure to establish at any time that the employee was not physically and mentally capable of performing his duties. Subsequently the employee was placed on sick leave while the agency was processing a disability separation action under 5 U.S.C. § 7701. It too was rejected on the basis that the medical evidence did not support the separation. The placing of an employee, who was willing and able to perform his duties, on involuntary sick leave is an unjustified and unwarranted personnel action, and, upon restoration to duty, the employee is entitled to have both periods of sick leave regarded as erroneous suspensions, and the salary received during the sick leave period regarded as backpay allowable under 5 U.S.C. § 7701. Therefore, recredit of the sick leave is proper. 39 Comp. Gen. 154 (1959). See also "Agency-filed application for disability retirement" in this chapter.

Army employee was placed on indefinite sick leave as a result of a medical examination which found him to be legally blind in one eye. The employee voluntarily applied for a disability retirement which was denied by the Civil Service Commission and he was restored to active duty. Employee is not entitled to have recredited the sick leave charged to him while application for retirement was pending since there is nothing to indicate that his leave was involuntary or that he was ready, willing, and able to work during such period. B-194020, May 12, 1981.

c. Pending fitness-for-duty examination

The initial administrative action to place a Veterans Administration police officer on involuntary sick leave pending a fitness-for-duty examination is justified where the conduct of the employee, after an on-the-job injury, raises a question concerning his ability to perform the duties of the position without disrupting hospital patients and personnel. Sick leave may not be restored since, after the scheduled medical examination, the employee was found not fit to perform the duties of his position. Also, it is not unreasonable for the agency to take 7 weeks to reach a final determination since the agency had to schedule additional medical tests and examinations when the initial tests proved inconclusive. B-192956, April 9, 1979.

d. Agency-filed application for disability retirement

An employee is not entitled to restoration of leave when placed on involuntary leave pending resolution of an agency-filed application for disability retirement. 41 Comp. Gen. 774 (1962); B-184522, March 16, 1976; and B-184706, January 12, 1976. However, if the application is denied by CSC and the agency files an appeal, the employee must be either restored to duty or separated pending the agency appeal. B-184522, March 16, 1976. See also B-206237, August 16, 1982.

Agency placed employee on involuntary leave and leave without pay pending Civil Service Commission's action on agency-filed application for disability retirement. Employee claims restoration of leave and backpay since Commission denied retirement application. Agency's placing employee on involuntary annual leave and leave without pay was not an unjustified or unwarranted personnel action where the agency's action was based on results of psychiatric evaluation. Record as a whole shows no reason why agency should not have relied on such competent medical evidence. B-195597, July 6, 1981.

e. Contagious disease

An employee suspected of having a contagious disease, who is placed on involuntary sick and annual leave pursuant to medical advice, is not entitled to restoration of the leave as the administrative action was a reasonable precaution to protect public health. 42 Comp. Gen. 438 (1963).

E. Employee Receiving  
Workers' Compensation

An employee who uses sick leave to recuperate from a work-related injury may "buy back" such leave pursuant to 20 C.F.R. § 10.310, be placed on leave without pay, and accept compensation for the injury under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8151. 58 Comp. Gen. 741 (1979). There is no other authority to "buy back" sick leave except under the conditions prescribed in 20 C.F.R. § 10.310. B-189531, September 14, 1977. However, with administrative approval an employee may liquidate advanced leave by refunding the value of the sick leave used and by being placed in a leave-without-pay status for that period. B-189531, September 14, 1977. See also 29 Comp. Gen. 76 (1949).

Under the provisions of the Federal Employees' Compensation Act, an employee who uses annual or sick leave during absences from work in connection with work-related injuries or illnesses may "buy back" or repurchase such leave and accept workers' compensation for the period of such absences under the act. We hold that an employee may not use accumulated annual or sick leave in order to liquidate an indebtedness owed the agency since annual and sick leave may not be converted into a monetary equivalent in these circumstances. See Donald R. Manning v. United States, 7 Cl. Ct. 128, 133 (1984); Government Printing Office—Workers' Compensation, B-229168, September 7, 1988.

An employee, who used annual leave instead of sick leave based on the incomplete advice received from the agency personnel office, may retroactively substitute sick leave for annual leave to avoid forfeiture of the annual leave in a workers' compensation leave buy-back situation. Prior decisions distinguished are listed on page 4-19 of this title. Gilbert J. Ramos, B-233945, February 24, 1989.

F. Awards

Approval of an incentive awards program for reduced usage of sick leave is the responsibility of OPM, and OPM has recommended against such approval. Awards—Telephone—Nonuse of Sick Leave, 67 Comp. Gen. 349 (1988).

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### G. Waiver

An employee on extended sick leave when his position was abolished on December 7, 1979, was carried in sick leave status until April 30, 1980, when he applied for a discontinued service retirement. Initially denied by OPM, the application for retirement was approved as of December 7, 1979, after GAO authorized a retroactive separation. The employee may be granted a partial waiver, representing the difference between the salary he received in the form of sick leave from December 7, 1979, to April 30, 1980, and the retroactive annuity payments he received for the same period. There is no indication that at the time he received it, he knew the payment of salary was or could become erroneous nor is there any indication of any fault, misrepresentation, or lack of good faith on the employee's part. He remains liable for the amount of sick leave salary that was duplicated by the retroactive annuity payments. James J. Burns, B-202274, June 24, 1987.

An employee in effect abandoned his federal position on the date he began a job with a local government, prior to completing a required year of service incident to a relocation he received from his federal employer. To give the appearance of completing the required year of service, the employee submitted documents purporting to show him on annual leave, sick leave, and leave without pay through the end of the required time in service. Pay for sick leave and a holiday he received after abandoning federal employment were erroneous payments subject to collection. Waiver of these payments is denied because the employee has not met the standards for waiver under 5 U.S.C. § 5584 (1988). John P. Maille, 71 Comp. Gen. 199 (1992).

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### H. Buy Back of Sick Leave—Injury Incurred Outside of Assigned Duties

GAO employee who was injured en route to work, wishes to reestablish her sick leave balance by using funds received from insurance settlement to "buy back" sick leave used. There is no authority to "buy back" accrued sick leave in absence of approved claim for injury incurred while performing duties. Vicki Lynn Miller, B-189531, September 14, 1977. See E of this chapter, above.

# Other Leave Provisions

## A. Administrative Leave

### 1. Generally

The term "administrative leave," while not officially recognized in legislation or executive regulation, is used to refer to an authorized absence from duty with pay and without charge to leave. Since there are no general OPM regulations covering administrative leave, each agency or department has the authority for determining the situations in which excusing employees from work without charge to leave is appropriate. However, for some of the more common situations in which agencies generally grant administrative leave, see FPM Supp. 990-2, Book 630, Subchapter 11 and 53 Comp. Gen. 582 (1974). For information regarding the granting of administrative leave to daily, hourly, and piecework employees, see 5 C.F.R. §§ 610.301-610.306.

### 2. Administrative discretion

#### a. Fire fighting

The denial of administrative leave to an employee for time spent as a member of a volunteer fire department in fighting a local fire outside his government installation was a proper exercise of administrative discretion. Each agency has the responsibility for determining situations in which excusing employees from work without a charge to leave is appropriate. 54 Comp. Gen. 706 (1975).

#### b. Emergency situation

A retroactive grant of 8 hours administrative leave to an employee by the local commander of an Air Force Base for time he spent in cleaning and arranging for repair of damages to his home that resulted from an ammunition train explosion, was a proper exercise of administrative discretion. Each agency, under the general guidance of decisions of the Comptroller General and FPM Supplement 990-2, Book 630, Subchapter 11, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate. 53 Comp. Gen. 582 (1974).

#### c. Donating blood

The granting of administrative leave to a civilian employee of the Army so that he, as one of two medically acceptable donors, could donate blood on a semiweekly basis to his critically ill nephew was a proper exercise of

administrative discretion. The matter is discussed in FPM Supplement 990-2, Book 630, Subchapter 11, which indicates that donating blood has been recognized as one of the areas for which administrative leave has been authorized under law, executive order, or decisions of our Office. B-188189, November 2, 1977.

d. Rest period after travel

The granting of administrative leave to an employee for an acclimatization rest after he completed a full day of duty and traveled over 7 hours by air on his return from Guam is a proper exercise of administrative discretion. Each agency, generally, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate. 55 Comp. Gen. 510 (1975). However, see 41 C.F.R. § 301-7.11 for current regulations on rest stops and Title III, Travel, CPLM.

For discussion of acclimatization rest in connection with the Fly America Act, see Title III—Travel, Chapter 4.

e. Rest break in office

Agencies may grant employees brief rest periods when such periods are determined to be beneficial or essential to the efficiency of the federal service. However, such periods are considered to be part of the employee's basic workday, and an employee who skipped a rest period and departed early would not have worked a full 40-hour week. Furthermore, any decision to expand a lunch period from 30 to 45 minutes should be done pursuant to 5 U.S.C. § 6101(a)(3)(F) rather than scheduling a 15-minute rest break prior to lunch. B-190011, December 30, 1977. See also B-188687, May 10, 1978.

f. Fulfillment of position requirements

When federal employees request administrative leave for a brief, determinate period of time to fulfill requirements of their position, the employing agency normally has discretion to grant the request. Thus, attorneys who are required to become members of a bar to maintain their employment may generally be granted administrative leave for the time required to attend a necessary state bar admission ceremony. But when a state provides for an attorney who is a federal employee to be sworn in to its bar in the vicinity of the attorney's permanent duty station and place of residence, the employing agency may grant administrative leave only if the

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attorney chooses the option of being sworn in locally. Andrew Maikovich, B-219112, August 14, 1985.

g. Sale of a horse

An employee who was transferred from Texas to Puerto Rico incident to a reduction in force began travel less than 30 days after travel orders were issued. The employee was granted administrative leave to sell a horse and equipment he used in official government business which, due to the short time involved, had to be sold with professional help at a distant location. The grant of administrative leave is a matter of agency discretion under the guidance of our decisions. We have no objection to the grant of administrative leave in the circumstances presented. Richard D. Knight, B-212688, December 16, 1983.

h. Handicapped employee

Where a handicapped employee arrived early at his temporary duty site in order to avoid driving in inclement weather it would be an appropriate exercise of administrative discretion for the agency to excuse the employee for the time in question, without a charge to his annual leave account. Steve Stone, 64 Comp. Gen. 310 (1985).

3. Amount of leave to be granted

a. Brief periods

An employee, who had been granted 1 week's administrative leave in connection with a change of station, did not complete the transfer because it was canceled. No objection will be made to the granting of such leave, if the agency determines it was granted for the purpose of complying with a transfer order before its cancellation. An agency may excuse an employee for brief periods of time without charge to leave or loss of pay. B-180693, May 23, 1974; and 44 Comp. Gen. 333 (1964).

An employee who reviews files at home instead of reporting to office prior to departure for temporary duty may be excused for brief periods of time without a charge to leave. B-193820, January 9, 1980.

b. Long periods

(1) Generally—Employee may not be placed on administrative leave with pay for an extended period. Nina R. Mathews, B-237615, June 4, 1990.

(2) Professional examination—Excused absences of 14, 28, and 31 days, without charges to leave, granted to employees for bar examination preparation are not authorized by statute and are not appropriate under FPM guidelines, pertaining to excusing employees for periods of brief duration. B-156287, February 5, 1975.

(3) Voluntary humanitarian service—An employee performed services for Africare, a private nonprofit organization assisting in the Sahelian Drought Relief Program. The services rendered were similar to those performed in her government position. However, she may not be granted administrative leave, since no authority exists for granting such leave to an employee of the executive branch for the purpose of engaging in voluntary, humanitarian work for a private, nonprofit organization for a period of 6 weeks. B-156287, June 26, 1974.

(4) International athletic competition—An employee of the Nuclear Regulatory Commission may not be granted 3 weeks' administrative leave to participate in the Pan American Games as a member of the United States Field Hockey Team. B-185128, December 3, 1975.

4. Medical purposes

a. Medical examinations

An agency head may excuse employees' absences to take administratively required physical examinations. Such absences without charge to leave or loss of pay by an employee should not be granted for extended periods of time. Nor should they be granted for any period the employee may subsequently be hospitalized to take more extensive tests and examinations based upon conditions discovered or medical suspicions resulting from the initial examination. 44 Comp. Gen. 333 (1964).

b. Veteran's physical examination

Under the provisions of Executive Order No. 5396, July 17, 1930, a disabled veteran shall be permitted to use annual or sick leave or leave without pay in order to receive medical treatment. However, it is not



within the discretion of the agency to grant administrative leave for treatment or examination. B-188012, May 10, 1977.

c. Work-related injury

An agency's action of placing an employee on administrative leave for 1-1/2 months due to an on-the-job injury was improper as no statutory authority exists for this action. Although certain situations which are discussed in FPM Supplement 990-2, Book 630, S11-5, have been recognized where an employee may be placed on administrative leave for brief periods of time, no such authority exists for granting extended periods of administrative leave. B-192510, April 6, 1979.

An employee who sustained a work-related injury was placed on administrative leave by the agency for a period of almost 4 months. The agency had no authority for granting the employee administrative leave for such an extended absence resulting from an injury. Accordingly, the agency should rescind the administrative leave and charge sick and annual leave for the period in question. Since the employee's leave balances were sufficient to cover only a portion of his 4-month absence from work, the agency should retroactively place him on leave without pay for the remainder of that period. Walter R. Boehmer, Jr., B-207672, September 28, 1983.

However, under the provisions of 5 U.S.C. § 6324 a member of the Executive Protective Service force may not be charged sick leave for an absence due to an injury or illness resulting from the performance of duty. The employee is placed on administrative leave. 57 Comp. Gen. 781 (1978).

d. Nonwork-related injury

An employee, who was injured and unable to perform his regular duties but who could perform other limited duties, submitted a grievance alleging that his agency did not comply with a labor-management agreement in that it did not "make every effort" to find a limited duty position for him. The recommendation of an arbitrator that the employee be granted 30 days of administrative leave may not be implemented by the agency. There is no legal authority to grant administrative leave under these circumstances. 53 Comp. Gen. 1054 (1974).

e. Disability retirement

A United States magistrate, who earns neither sick nor annual leave, may not have 35 days of administrative leave retroactively granted so as to change the date of his disability retirement from November 9, 1976, to December 31, 1976. An employee's separation date may not be changed absent a bona fide administrative error and there is no authority to grant administrative leave under these circumstances. B-190533, December 2, 1977.

5. Other specific situations

a. Incident to relocation

A transferred employee seeks restoration of 8 hours annual leave charged to his leave account while he was awaiting the arrival of movers on a scheduled day of travel. If his agency determines that he delayed travel while reasonably and necessarily awaiting movers, GAO would interpose no objection if he was administratively excused for such time. 55 Comp. Gen. 779 (1976).

Transferred employee who used 40 hours of administrative leave for pre- and post-moving arrangements as authorized by agency regulation was charged annual leave for time in excess of 40 hours used for separate trip to deliver his automobile to a port for shipment overseas. Although traveltime to and from a port to deliver an automobile may be charged to administrative leave, the employee is not entitled to reinstatement of charged leave for it is within administrative discretion to set a maximum on the time an employee is away from official duty without a charge to annual leave. B-194311, January 28, 1981.

b. Incident to training

Where the FAA has authorized travel by common carrier to a training site and has determined that travel by privately owned vehicle is not advantageous to the government, the FAA may not grant administrative leave for the excess traveltime occasioned by an employee's use of a privately owned vehicle as a matter of personal preference. 56 Comp. Gen. 865 (1977).

However, it is permissible for a union contract between the FAA and its employees to provide that 1 day of administrative leave will be provided to FAA employees on temporary duty at the FAA Academy, Oklahoma City,

Oklahoma, for the purpose of finding living accommodations. Because accommodations are not provided the employees and per diem is reduced due to the extended temporary duty, the 1-day provision would be consistent with prior decisions recognizing that various situations within the context of official travel may require administrative leave, especially if they directly or indirectly further the agency's function. B-192258, September 25, 1978.

c. Counsel appointed for indigents

Federal attorneys who serve as counsel to indigent defendants in state and federal court cases may not be excused from their federal employment without a loss of pay or a charge to annual leave. 44 Comp. Gen. 643 (1965) and 61 Comp. Gen. 652 (1982).

d. Absentee ballot voting

Directive in FPM, authorizing agencies to permit employees who desire to vote in states where they maintain voting residences to be excused for that purpose without charge to annual leave, except where voting by absentee ballot is permitted, may not be extended by administrative regulation so as to authorize the excusing of an employee, without charge to annual leave, who absents himself from work for 1 day in order to vote in a state where voting by absentee ballot is permitted. 32 Comp. Gen. 361 (1953).

e. Employee under investigation

During an investigation of an employee for wrongdoing, when it is in the interest of the government to have the employee off the job, it is not proper to place the employee in an enforced leave status. Instead the employee may be relieved from duty and continued in a pay status without charge to leave for the short time (24 hours or so) necessary to process his suspension. 38 Comp. Gen. 203 (1958).

f. Employee being removed

An employee who was notified on March 5 of his separation for cause effective March 10 may be granted excused absence from March 5 through March 10 but may not be granted additional excused absence when separation date was postponed to March 16. B-194576, January 10, 1980.

g. Bad weather

It is within the discretion of the employing agency to allow only 2 hours of administrative leave for inclement weather even though the employee claimed 15 hours of administrative leave for severe ice conditions which caused him to be late for work. B-189775, October 19, 1977.

An employee may not be allowed 2 days of administrative leave where her return to work from annual leave was delayed due to a severe snow storm at her vacation site. B-193389, November 29, 1978.

However, where an employee's return to duty from a vacation site was delayed due to a snow storm which affected both the vacation site as well as the duty station, it is within the discretion of the agency to grant administrative leave depending upon the efforts of the employee to reach his office. B-195688, February 6, 1980, distinguishing B-193389, November 29, 1978.

h. Employees on annual leave—early dismissal—emergency weather

Following a late evening return from a temporary duty assignment in Virginia, several employees of the Portsmouth, New Hampshire, Naval Shipyard took annual leave the next day. While these employees were on annual leave, most employees were dismissed at noon because of a hurricane and given 4 hours administrative leave. The employees on annual leave were charged annual leave for the entire day, but claim entitlement to 4 hours administrative leave on the basis that they had intended to schedule only 4 hours of annual leave and would have reported for duty but for the early dismissal. Since none of the employees on leave informed the agency that they would be reporting for duty at any time that day, the agency reasonably applied the leave regulations by placing the employees in an annual leave status for the entire shift. Anthony J. Sarni, et al., 66 Comp. Gen. 607 (1987).

Fort Eustis, Virginia, and Fort Monroe, Virginia, experienced heavy snowfall resulting in a large number of employees reporting late for duty on January 21, 1985. The Commanders at both installations originally authorized up to 2 hours of administrative leave for employees reporting late. Several days thereafter, the Commander of Fort Monroe retroactively declared Fort Monroe to have been closed for 2 hours on the date in question, resulting in a 6-hour workday. The decision whether to close a federal installation is committed to agency discretion, but in this case the decision of the Fort Monroe Commander to retroactively close the fort for 2 hours on the day in question was an abuse of agency discretion.

Therefore, his decision was not effective to alter the leave status of employees who did not report to the installation on January 21. Fort Monroe, B-219232, September 26, 1986.

i. Professional examination

Excused absences of 14, 28, and 31 days, without charges to leave, granted to employees for bar examination preparation are not authorized by statute and are not appropriate under FPM guidelines pertaining to excusing employees for periods of brief duration. B-156287, February 5, 1975.

j. Union activities

Under the provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1214, employees shall be authorized official time while representing a labor organization in the negotiation of a collective-bargaining agreement. In addition, the Federal Labor Relations Authority may determine whether official time shall be authorized to employees participating in proceedings before the Authority. All other matters concerning the use of official time are subject to negotiation between the agency and the union, except for matters solely relating to the internal business of a labor organization which must be performed when the employee is in a nonduty status. See 5 U.S.C. § 7131.

k. Advice to federal credit unions

The granting of administrative leave to federal employees to render advice and support to federal credit unions is a proper exercise of administrative authority. The amount of administrative leave granted is a matter of administrative discretion, and an agency may establish limits as to the amount of administrative leave which may be granted each employee during specific intervals of time. Grants of administrative leave are usually for short periods of time. Also, the types of activities for which excused absences may be granted are matters of administrative discretion and may be specified or listed in agency regulations. Administrative Leave—Federal Employees Providing Advice and Support to Federal Credit Unions, 63 Comp. Gen. 542 (1984).

l. Daylight saving time

Employees who work the night shift on the last Sunday in April when clocks are set ahead for daylight saving time may not be allowed 1 hour of administrative leave at the end of the shift to fulfill the requirement that they work 8 actual hours. Employees must use 1 hour of annual leave, or in the alternative by union agreement or agency policy, employees may be allowed to work 1 hour beyond the end of their shift. 57 Comp. Gen. 429 (1978).

m. RIF—administrative leave during notice period

The Assistant Secretary of the Navy (Financial Management) proposes to provide by regulation that employees subject to reduction-in-force (RIF) procedures be placed on administrative leave during the 30-day RIF notice period. The Secretary is advised that there is no authority to grant administrative leave under these circumstances. Further, the Office of Personnel Management regulations state that an employee should remain in a duty status during the advance notice period. 66 Comp. Gen. 639 (1987).

n. Pending voluntary retirement

Employee, who voluntarily took leave without pay (LWOP) to preserve possible eligibility for early retirement pending determination of creditable service, returned to duty 42 workdays later after being found ineligible. His request that LWOP be changed to administrative leave because he was misled by agency's errors must be denied since there is no authority for administrative leave for such purpose or extended period. AND, since the employee voluntarily took LWOP to preserve possible eligibility for early retirement, knowing there was a question about his eligibility, he was not entitled to backpay under 5 U.S.C. § 5596 when he was found ineligible since there was no unjustified or unwarranted personnel action. B-200015, November 17, 1980. See also Gladys W. Sutton, B-209652, August 12, 1983.

o. Insurance proceeds

Under 5 U.S.C. § 6324, a member of the Executive Protective Service is not charged sick leave while recuperating from an on-the-job injury. The employee is placed on administrative leave. The United States has no authority to collect from the liability insurer of the negligent party causing the employee's injury an amount to compensate itself for the administrative leave granted the employee. 57 Comp. Gen. 781 (1978).

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p. Partial shutdown of agency

In its discretion, the Merit Systems Protection Board (MSPB) may retroactively grant administrative leave with pay to employees who were ordered not to report for work during a brief partial shutdown of the agency implemented in order to forestall a funding gap which would have necessitated a full closedown. The MSPB may grant such leave to the extent appropriated funds were available and adequate on the dates of the partial shutdown. Merit Systems Protection Board, 62 Comp. Gen. 1 (1982).

q. Furloughs

Incident to a forced agency furlough plan, an employee took 3 furlough days off without pay during a scheduled furlough period. The furlough plan was later canceled and the employee was allowed to substitute annual leave for the 3 days. The agency's denial of the employee's request for restoration of annual leave was an appropriate exercise of its discretion, in the absence of a showing that others similarly situated were granted an excused absence with pay. Steven M. Rudolph, B-219211, December 9, 1985. Compare Merit Systems Protection Board, 62 Comp. Gen. 1 (1982).

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B. Holidays

1. Generally

Title 5, U.S.C. § 6103(a) designates certain days as legal public holidays. Subsection (b) establishes the rules to be applied to federal employees when a holiday designated by law or executive order falls on a Saturday. Subsection (c) designates January 20 of each fourth year after 1965, Inauguration Day, a holiday for federal employees who work in the metropolitan Washington area. Title 5, U.S.C. § 6104 extends similar benefits to employees paid on a daily, hourly, and piecework basis. See also Executive Order No. 11582, February 11, 1971, and 5 C.F.R. §§ 610.201 and 610.202.

2. Inclusion of holiday in regular workweek

In the absence of specific legislation to the contrary, an administrative office may, within its discretion, include a holiday within the official hours of duty or regular workweek of employees and require them to work on that day. 22 Comp. Gen. 762 (1942) and 27 Comp. Gen. 191 (1947).

3. Local and foreign holidays

It is within the administrative discretion of agencies to close field offices in the United States, its possessions, or foreign countries on local holidays where federal work may not be properly performed. When the office is thus closed, such days are not chargeable to annual leave, and employees paid on an annual or monthly basis are entitled to compensation for such days. 17 Comp. Gen. 298 (1937).

Air Force employees stationed in Saudi Arabia on temporary duty were denied access to their work areas for 15-day period because of local Ramadan holiday. Employees who elected to leave the country during this period are entitled to administrative leave in same manner as employees who remained in the country. B-199961, July 7, 1982.

4. Irregular unscheduled holiday work

An employee receiving premium pay for standby duty under 5 U.S.C. § 5545(c)(1) may be excused from work on holidays within his regular tour of duty without charge to leave when the employing agency determines that his services are not required on the holiday. 56 Comp. Gen. 551 (1977), overruling 54 Comp. Gen. 662 (1975). See also B-192815, December 7, 1978.

If the employee's services are administratively required on the holiday and he absents himself on a holiday within his regularly scheduled tour of duty, he must be charged leave. 56 Comp. Gen. 551 (1977), overruling 54 Comp. Gen. 662 (1975). See also B-193709, November 28, 1979.

The 1977 decision (56 Comp. Gen. 551) was a changed construction of law and was limited to prospective application. Leave which was credited or paid lump sum under the authority of 54 Comp. Gen. 662 prior to April 19, 1977 (the effective date of 56 Comp. Gen. 551), need not be collected. However, if such leave was not recredited or paid prior to April 19, 1977, there is no authority to do so after that date. 58 Comp. Gen. 345 (1979).



5. Part-time employee

Part-time employee was scheduled to work 4 hours on Washington's Birthday but did not due to holiday observance. Under 5 U.S.C. § 6104 employee is entitled only to 4 hours of pay as if work was performed, irrespective of entitlement of other part-time employees who were scheduled to work 8 hours that day. B-194821, April 24, 1980.

6. Compressed work schedule

Employees working four 10-hour workdays under Title II of Federal Employees Flexible and Compressed Work Schedules Act of 1978, Pub. L. No. 95-390, shall receive 10 hours off for a holiday. However, employees working flexible schedule under Title I of act are limited by the statute to 8 hours off for a holiday. B-196653, December 31, 1979.

7. Holiday pay—seasonal employees

Seasonal employees of the IRS who were hired during the tax return filing season for as long as needed were not entitled to be paid for Memorial Day holiday although separated from service on the day following the holiday. At the close of business on the workday preceding the holiday, there remained no further work for the employees and hence the employees were precluded by lack of work and not the holiday observance from performing any work. B-193821, June 18, 1979, distinguishing 56 Comp. Gen. 393 (1977) and 45 Comp. Gen. 291 (1965).

8. "In lieu of" holiday

Under Executive Order No. 11582, February 11, 1971, an employee whose basic workweek is Tuesday through Saturday is entitled to Saturday off, an "in lieu of" holiday, when a holiday falls on Monday, a regular day off. Therefore, when an agency incorrectly requires employees to take Tuesday as a holiday, the employees are entitled to holiday premium pay for working on Monday and must be paid for Tuesday without a charge to annual leave. B-127474, February 9, 1979.

However, because part-time employees are not entitled to a day "in lieu of" a holiday which does not fall within their basic workweek, part-time employees on a Tuesday-through-Saturday workweek must take annual leave or leave without pay when the workplace is closed on Saturday by

administrative order due to a Monday holiday. B-192104, September 1, 1978.

Although part-time employees are not covered by 5 U.S.C. § 6103(b) and Executive Order No. 11582 which authorize designated and "in lieu of" holidays for full-time employees when an actual holiday falls on an employee's nonworkday, agencies have the discretion to grant part-time employees administrative leave for those holidays falling within the part-time employees' regularly scheduled workweek. Shirley A. Lombardo, 63 Comp. Gen. 306 (1984). See also Part-time employees, B-214156, May 29, 1984.

9. Nonpay status before and after holiday

An employee in a nonpay status for the workdays immediately before and after a holiday may not receive compensation for a holiday on which he performed no work since there is no presumption that he would have worked on the holiday if it had been a regular working day. B-187520, February 22, 1977; and B-186687, January 13, 1977. See also 9 Comp. Gen. 350 (1930).

10. Pay status before or after holiday

An employee in a pay status for the workday immediately before or after a holiday is entitled to pay for the holiday regardless of whether he is on leave without pay or absent immediately succeeding or preceding the holiday. 56 Comp. Gen. 393 (1977), overruling 13 Comp. Gen. 207 (1934) and modifying 45 Comp. Gen. 291 (1965); 18 Comp. Gen. 206 (1938); 16 Comp. Gen. 807 (1937); and 13 Comp. Gen. 206 (1934).

11. Employee refuses to work holiday

When, regardless of the need for his services, an employee unjustifiably absents himself or refuses to work on a holiday contrary to a proper administrative order, there is no requirement that such absence must be excused or that the employee be paid his regular compensation for that day. The agency is not required to charge such absence to annual leave. However, while an administrative deduction of pay, because of such refusal to work that day, is not an adverse action, any suspension or other disciplinary action affecting the employee's pay for any other day would be subject to the laws, regulations, and procedures applicable to such disciplinary actions. 44 Comp. Gen. 274 (1964).

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12. Holiday good-will gesture

On the last workday before Christmas, an Installation Commander released the Installation's civilian employees for the afternoon as a "holiday good-will gesture." The civilian personnel officer found the action to be a humbug stating that the Commander had no authority to release employees as a holiday good-will gesture. The Installation Commander's exercise of the discretionary authority to grant excused absence in the circumstances was a lawful order under existing entitlement authorities. It follows that the employees in question are entitled to administrative leave—everyone of them. A Christmas Case, 64 Comp. Gen. 171 (1984).

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C. Court Leave

1. Generally

An employee of the United States or of the government of the District of Columbia is entitled to leave, without loss of or reduction in pay or leave to which the employee is otherwise entitled, for a period of absence during which the employee is summoned in connection with a judicial proceeding to serve as a juror or as a witness on behalf of a state or local government. 5 U.S.C. § 6322(a).

For materials relating to the disposition of juror and witness fees and expense payments made to federal employees, see Title I of this manual, Compensation, Chapter 9.

Where an employee forfeited 16 hours of scheduled annual leave because he performed jury duty, he is entitled to restoration of the forfeited leave since jury duty constitutes an exigency of the public business under 5 U.S.C. § 6304(d)(1)(B). 60 Comp. Gen. 598 (1981).

2. Prevailing plaintiff in discrimination action

Although not entitled to court leave under 5 U.S.C. § 6322 which is limited to jurors and certain summoned witnesses, an employee who prevails in a discrimination action filed against her agency in federal court is entitled to official time for attendance at her trial without charge to leave. 59 Comp. Gen. 290 (1980).

3. Unsuccessful litigant in discrimination action

An agency granted court leave in connection with employee's unsuccessful discrimination action against his employing agency under Title VII of the Civil Rights Act of 1964, as amended, codified at 42 U.S.C. § 2000e-16 et seq. Although the agency's determination to grant the employee court leave predated the Office of Personnel Management's instructions making it clear that court leave is not authorized in this situation, the employee's absence should be charged to the otherwise appropriate leave account on the basis of our holding in Wilma Pasake, 59 Comp. Gen. 290 (1980). There is no basis to consider the holding in Pasake as applicable only from the date FPM Bulletin 630-38 was issued some 5 months after the decision was rendered. That bulletin merely clarifies the purpose of 5 U.S.C. § 6322 in a manner consistent with our holding in Pasake. B-201602, April 1, 1981.

4. Representation of indigent defendant

An employee of the Veterans Administration, who is licensed to practice as an attorney in New Jersey, was involuntarily summoned to represent an indigent defendant. He may not be granted court leave for such duties. 61 Comp. Gen. 652 (1982).

5. Unsuccessful plaintiff in action against federal government

An employee who brought an action in United States district court against the Department of Labor (DOL), seeking to prevent her removal from her position by the Secretary of Labor, was charged 4 hours of annual leave for time spent observing oral argument in her case. The district court ruled she was improperly separated but the United States Court of Appeals upheld her separation. DOL did not abuse its discretion in charging her annual leave since there is no basis for an unsuccessful plaintiff suing the federal government to have such time considered official time. Furthermore, 5 U.S.C. § 6322 granting court leave to jurors or witnesses does not apply here. Ismene M. Kalaris, B-212031, September 27, 1983.

6. Service as a juror

a. Eligibility

(1) Part-time employee—A part-time federal employee with a regular tour of duty who is called for jury service in a United States court is entitled to court leave under 5 U.S.C. § 6322 for those periods of jury service that

coincide with his regularly scheduled tour of duty. 36 Comp. Gen. 378 (1956).

(2) Temporary employee—An employee serving under a temporary appointment is eligible for court leave under 5 U.S.C. § 6322. 48 Comp. Gen. 630 (1969).

(3) When-actually-employed employee—Employees working on an intermittent or when-actually-employed basis without a regular tour of duty are not eligible for court leave under 5 U.S.C. § 6322. 49 Comp. Gen. 287 (1969).

A career-conditional employee on a when-actually-employed basis who has a regularly scheduled tour of duty, may be granted court leave for jury duty performed on scheduled workdays, since her employment covered a protracted period under a continuing established work schedule. Although, technically, the conditions of her employment call for a when-actually-employed designation, they may be viewed as tantamount for court leave purposes, to those of temporary employees, whose entitlement to such leave was upheld in 48 Comp. Gen. 630 (1969). See also B-166056, August 12, 1970.

b. Administration

(1) Duration of jury service—A federal employee under a proper summons from a state or federal court to serve on a jury may be granted court or jury leave for the entire period from the date on which he is required to report to court, to the time he is discharged by the court, regardless of the number of hours per day or the days per week he actually served on a jury during the period. 20 Comp. Gen. 131 (1940) and 20 Comp. Gen. 181 (1940).

(2) Employee excused or discharged by court—Jury service for which a government employee is entitled to court leave does not include periods when the employee is excused or discharged by the court, either for an indefinite period subject to call by the court or for a definite period in excess of 1 day. 20 Comp. Gen. 181 (1940) and 26 Comp. Gen. 413 (1946).

(3) Return to duty when excused by court—If the return of a juror to duty would not involve hardship, such as depriving an employee on night duty of his sleep or where the place of duty is far removed from the court, an agency, in its discretion, may inform a prospective juror that if he is

excused from jury duty for 1 day or a substantial portion thereof, he should return to his regular duty or suffer a charge against annual leave. 26 Comp. Gen. 413 (1946).

When an employee will be expected to perform jury duty for a substantial part of the day on the date stated in the summons commencing jury service, the employee is not required to report to work that same day. Once summoned by a court for jury duty, an employee's primary responsibility is to the court. When it is apparent that an employee will be required to perform jury duty for less than a substantial part of the day, and when it is reasonable to do so, the employee's agency may require the employee to report for work prior to reporting for or after being excused from jury duty. 60 Comp. Gen. 412 (1981).

An employee who resided in Virginia and whose permanent duty station was Washington, D.C., was summoned to jury duty in New Jersey for a 1-week period beginning on a Monday. The employee is entitled to court leave for the Friday he was excused from jury duty under the holding in 26 Comp. Gen. 413 (1946). In view of the substantial distance involved, it would have imposed a hardship to have required the employee to return to his permanent duty station following a day of jury service on Thursday to report for duty on Friday. C. Robert Curran, 64 Comp. Gen. 851 (1985).

(4) Night jury service—An employee, who performs duty for a full workday and then sits on a grand jury in the evening, may be granted court leave for the day following such duty to the extent necessary to alleviate hardship. The employee is entitled to retention of a pro rata portion of his grand jury fee to the extent that the hours actually served exceed hours of court leave granted. B-70371, August 5, 1975.

(5) Weekend duty—It would be a hardship on Federal Aviation Administration employees who are called for weekday jury duty and whose tours of duty include work on Saturdays or Sundays, or both, to require them to work their regularly scheduled weekend days in addition to serving on juries on 5 weekdays. Therefore, the Federal Aviation Administration may establish a policy to permit those employees to be absent on weekends without charge to annual leave and with payment of premium pay normally received by them for work on Saturdays and Sundays. 54 Comp. Gen. 147 (1974).

(6) Employee eligible for excusal—An employee who commuted to his permanent duty station in Washington, D.C., from a residence in Virginia,

and who also maintained a residence in New Jersey, was called to serve as a juror in New Jersey. The employee's agency denied court leave after determining that he might have been excused from jury duty since he was living in Virginia. The employee is entitled to court leave under 5 U.S.C. § 6322 even though he did not advise the court of facts that might have excused him from jury service. C. Robert Curran, 64 Comp. Gen. 851 (1985).

c. Relation to other types of leave

(1) Annual leave

(a) Employee on annual leave—If an employee is on annual leave when called for jury service, court leave should be substituted. 27 Comp. Gen. 83 (1947).

An employee on annual leave under an advance notice of separation from the federal civilian service due to a reduction in force was summoned as a juror. He is entitled to have otherwise proper court leave substituted for annual leave, not to extend beyond the date administratively fixed for his separation. 27 Comp. Gen. 414 (1948).

(b) May not be substituted for court leave—The requirement that a period of absence for jury service be without a deduction from other types of leave of absence is mandatory. The effect of the law is not to deny the employee the use of annual leave. The intent is to preserve other leave rights without diminution resulting from jury service. Thus, regardless of whether an employee may desire to use annual leave when serving on a jury, the fact remains that annual leave is being diminished if it is used, which is prohibited by statute. B-119969, March 21, 1969.

(c) Forfeiture of annual leave—Where an employee forfeited 16 hours of scheduled annual leave because of jury duty, the annual leave may be restored since jury duty constitutes an exigency of the public business under 5 U.S.C. § 6304(d)(1)(B). See 5 U.S.C. § 6322 which prohibits the loss of or reduction in annual leave where an employee is summoned to perform jury service. 60 Comp. Gen. 598 (1981).

(d) Leave without pay—An employee on leave without pay, although otherwise eligible, may not be granted court leave when called to jury duty. Court leave is available only to an employee who, except for jury duty, would be on duty or on leave with pay. 27 Comp. Gen. 83 (1947).

7. Service as a witness

a. Generally

An employee who is summoned or assigned by his agency to (1) testify or produce records on behalf of the United States or the District of Columbia, or (2) testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia, is performing official duty for the period of such service. 5 U.S.C. § 6322(b).

b. Testimony in official capacity

When an employee is summoned or assigned by his agency to testify in his official capacity or to produce official records, he is in an official duty status and entitled to his regular compensation without regard to any entitlement to court leave. 38 Comp. Gen. 142 (1958).

c. Former employee

An employee is considered to be a witness in his official capacity when he is called as a witness in the official capacity of a former position he held in the federal service, as well as when called as a witness in the official capacity of the position in which he is currently serving. B-160343, November 23, 1966.

d. Private litigation

Pub. L. No. 94-310, June 15, 1976, 90 Stat. 687, amended 5 U.S.C. § 6322 to permit court leave to serve as a witness on behalf of any party in a judicial proceeding where the United States, the District of Columbia, or any state or local government is a party. Previously, we held that employees who were summoned to appear as individuals and not in their official capacities in a suit in the Court of Claims by fellow employees for overtime compensation were not entitled to court leave authorized by 5 U.S.C. § 6322, for the period of absence in which they appeared as witnesses on behalf of a private party and without official assignment. 52 Comp. Gen. 10 (1972).

e. Appearance in juvenile court proceedings

An employee summoned to appear on several occasions in juvenile court proceedings in Pennsylvania concerning her son is not entitled to court



leave under 5 U.S.C. § 6322 since she was summoned as a party to the proceedings rather than as a witness, under a Pennsylvania statute which provides that the court shall summon the parents, guardian, or custodian, and any other persons as appear to the court to be "proper or necessary parties to the proceeding." Court Leave, B-214719, June 25, 1984.

f. Employee-defendant as witness

An employee who is summoned to county court for a traffic violation is not entitled to court leave as a witness under 5 U.S.C. § 6322 in connection with his appearance in court as a defendant. Entitlement of Employee-Defendant to Court Leave, 62 Comp. Gen. 87 (1982).

g. To accompany child to judicial proceeding

Court leave authorized by 5 U.S.C. § 6322 to employees serving as witnesses is limited to the time required by an employee to appear personally as a witness or a juror. Consequently, this statutory provision does not permit court leave to an employee required to accompany her 10-year-old son who was a witness at a federal grand jury proceeding. Court Leave to Accompany Child to Judicial Proceeding, 66 Comp. Gen. 355 (1987).

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## D. Military Leave

### 1. Generally

Military leave for civilian employees of the District of Columbia and federal employees, as defined by 5 U.S.C. § 2105 is authorized by 5 U.S.C. § 6323. Military leave is available to all permanent or temporary indefinite federal and District employees who are members of a reserve component of the armed forces or the National Guard.

Under 5 U.S.C. § 6323, as amended by Pub. L. No. 96-431, October 1, 1980, 94 Stat. 1850, employees are allowed military leave as follows:

- Reserve members of the armed forces or members of the National Guard are entitled to up to 15 days of military leave during each fiscal year while performing active duty for training;
- Reserve members of the armed forces or National Guard are entitled to 22 days of military leave when performing federal service or full-time military service with the National Guard for the purpose of providing military aid to enforce the law or for providing assistance to civil

authorities in the protection or saving of life or property or the prevention of injury; or

- Members of the National Guard of the District of Columbia are entitled to military leave for each day of a parade or encampment ordered pursuant to Title 39 of the District of Columbia Code.

A civilian federal employee, who is a member of the reserves, is entitled to accrue and carry over 15 days of military leave each fiscal year in spite of the fact that he did not request such leave and regardless of whether he was a member of an active or inactive reserve unit. The military leave statute, 5 U.S.C. § 6323, makes no distinction for accrual purposes between the employee's participation in an active or inactive reserve unit. Galen Rex Quinn, B-227222, November 5, 1987.

Note the provisions of 5 U.S.C. § 5519, which requires the crediting of military pay against civilian compensation where military leave has been granted under 5 U.S.C. § 6323(c). See D., 6. of this chapter.

While 5 U.S.C. § 6323 authorizes employees who are in the reserves of the armed services up to 15 days in a calendar year for active duty without a loss in pay or time in service, this section does not operate to shorten the time required of an employee in an apprentice training period prior to promotion. Therefore, promotions conditioned upon the successful completion of a training program are properly delayed by the amount of time on military leave. B-189002, February 8, 1978.

Title 5, U.S.C. § 6323(a) provides that an employee is entitled to military leave only if he is on active duty. See 10 U.S.C. § 270(a). Where an employee is required to attend weekend drills or attend training while in an inactive duty status, he is not entitled to military leave. B-188145, November 15, 1977; and B-187704, May 6, 1977. See also 32 Comp. Gen. 363 (1953). Any absence from work should be charged to annual leave.

An employee of the Government Printing Office (GPO), after initially reporting for 14 days of active duty for training with his Air Force Reserve unit returned to GPO on the first day of his military duty and performed 7-1/2 hours of overtime work on a nonregularly scheduled day of work. Once an employee reports for active military duty he may not be paid for performing his normal civilian duties, since active military duty is incompatible with civilian service with the government. Schofield C. Ford, B-222967, June 2, 1987.

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2. Entitlement

a. Temporary employees

Intermittent and temporary employees of the federal government, appointed for less than 1 year, are not eligible for military leave under 5 U.S.C. § 6323. 54 Comp. Gen. 999 (1975). See also Jerry L. Donathan, B-232438, February 24, 1989.

b. Temporary indefinite employees

Employees assigned to an executive agency under the Intergovernmental Personnel Act, 5 U.S.C. § 3374, are eligible for military leave with pay under 5 U.S.C. § 6323, provided their appointments are for a period in excess of 1 year. The Comptroller General has held that Congress intended to exclude from eligibility for military leave only employees having part-time, intermittent, and temporary appointments for less than 1 year. B-173997, June 19, 1972.

c. Law clerk-trainee

Since the extension of appointments to 14 months of law clerks serving under 5 C.F.R. § 213.3102(e) does not change the nature of those appointments to permanent or temporary indefinite, there is no basis for granting military leave with pay under 5 U.S.C. § 6323 to law clerk-trainees prior to the conversion of their appointments to permanent appointments. B-173997, October 27, 1971; B-154080, July 16, 1964; and B-159563, March 17, 1973.

d. Term appointments

Employees under term appointments for periods of more than 1 year but not to exceed 4 years (unlike temporary employees appointed for less than 1 year) are eligible for military leave under 5 U.S.C. § 6323. 46 Comp. Gen. 72 (1966).

e. Part-time employees

5 U.S.C. § 6323(a)(2) authorizes accrual of military leave to part-time employees on a percentage basis.

f. Appointees

An appointee prior to entry on duty is not entitled to military leave since an appointment to the civil service is effective only after the appointee has accepted the appointment and has actually entered on duty. An appointee is not an employee as defined in 5 U.S.C. § 2105. B-205972, May 25, 1982.

g. Key federal employees—members of standby reserve

Special agents of the FBI who have been designated Key Federal Employees and are members of the Standby Reserve are entitled to military leave under 5 U.S.C. § 6323(a) when they are on active duty for training. The employees may not use or be charged annual leave for such duty unless the period of active duty for training exceeds the military leave available to the employee. Federal Bureau of Investigation—Active Standby Reserve Elective Training, B-208706, August 31, 1983.

3. Granting

a. Additional days

When a federal employee, who as member of a reserve component of the armed forces or the National Guard performs law enforcement services for a state or the District of Columbia, exhausts the 22 days of additional leave provided under 5 U.S.C. § 6323(b), he may not be granted administrative leave. The discretionary authority of agency heads to excuse employees when absent without charge to leave may not be used to increase the number of days an employee is excused to participate in reserve and National Guard duty. Therefore, an employee who has exhausted his section 6323(b) military leave may not be further excused from duty without loss of pay or a charge to leave for performing military duty. 49 Comp. Gen. 233 (1969). See also B-231760, February 17, 1989, where leave was denied under 5 U.S.C. § 6323(b) for help in the effort to fight forest fires.

b. Uncommon tour of duty

To avoid a disparity in the benefits between employees who work five 8-hour tours of duty and those who work uncommon tours of duty, the leave benefits provided in 5 U.S.C. § 6323(b), prescribing 22 additional days of military leave for civilian employees who as members of a reserve component of the armed forces or the National Guard perform law enforcement services, should be converted into hours and charged in units

of hours on the same basis as annual and sick leave is charged under 5 U.S.C. §§ 6301-6312. 49 Comp. Gen. 233 (1969).

c. Weekend drills

Civilian employees whose regular workweek includes Sunday, may not take military leave under 5 U.S.C. § 6323(a) (1976) to attend weekend Navy Reserve drills since an employee, as a member of a reserve component of the armed forces, is entitled to military leave under section 6323(a) only if he is on active duty under 10 U.S.C. § 270(a) (1976). Drills are inactive duty. B-202564, July 31, 1981.

4. Status prior to military duty

a. Leave without pay

An employee of the Interstate Commerce Commission was placed on leave without pay incident to his hospitalization. Subsequently, during convalescence he received orders to active military duty as a reserve officer in the Army Judge Advocate General's Corps. He may properly be paid for 15 days of military leave only if it may be determined that he would have been in a civilian pay status during the first 15 days of his military service but for the requirement that he perform such military service. B-166993, June 18, 1969; and 37 Comp. Gen. 608 (1958).

A civilian employee on leave without pay due to insufficient annual leave immediately prior to military leave and in a nonpay status for part of the next working day after his return from 17 days of military duty may receive payment for 15 days of military leave pursuant to 5 U.S.C. § 6323. But for the requirement to perform military duty he would have been in a civilian pay status during the first 15 days of his military duty period, and upon return he could be considered in a civilian pay status, having performed official duties in his regular civilian position for a portion of the day. B-179444, September 27, 1973.

b. After erroneous separation

An employee was reemployed under a temporary appointment in the same position from which he was separated by a reduction in force. He was then ordered to be restored to his former position, retroactive to the date of separation, pursuant to a CSC decision which regarded the employee as retaining the same status as when he was improperly removed. He may

have military leave, which was denied because of the temporary appointment, substituted for annual leave and leave without pay. 34 Comp. Gen. 442 (1955).

5. Administration of military leave

a. Under section 6323(a)

(1) Nonworkdays—Air Force employees, who were ordered to military duty for three separate 5-day periods, covering Monday through Friday, with a return to civilian status on weekends, are not chargeable with military leave for the intervening weekends, even though they occurred between periods of military duty. Military leave under 5 U.S.C. § 6323(a) is chargeable only for such days as an employee is in a military duty status. Therefore, any annual leave charged for such weekends should be restored, if not in excess of the maximum accumulation permitted by law, and any leave without pay should now be paid. B-149951, November 23, 1962; and B-171947.27, September 7, 1972.

Naval reservists, whose 15-day military leave authorized by 5 U.S.C. § 6323(a) includes nonworkdays and incorporates Saturday and Sunday at the start and end of leave, may not contend that the phrase “from his duties” as used in the military leave acts excludes nonworkdays. Nonworkdays occurring at the start and close of military leave are not included in the period of military leave. B-133674, December 30, 1957. See also B-188145, November 15, 1977.

When an employee of a government agency reports for active duty for training he should be placed in a military leave status on the first day for which he was regularly scheduled to work and continued in a military leave status until the last regularly scheduled workday, including intervening nonworkdays, such as holidays and weekends, occurring within his tour of active duty. Schofield C. Ford, B-222967, June 2, 1987.

Employees who were ordered to advance duty June 5-6 and summer camp June 7-21 must be charged military leave for nonworkdays at beginning of summer camp since the absence for military leave was continuous and the weekend of June 7-8 fell wholly within the period of absence. 61 Comp. Gen. 558 (1982). See also George McMillan, B-211249, September 20, 1983.

An agency may allow an employee to choose not to use military leave at all for workdays included in an absence due to military duty but rather to

cover the workdays by taking annual leave, leave without pay, compensatory time off, or a combination of these. In such a situation, there need be no charge to military leave for the nonworkdays wholly within the absence. Military Leave, 71 Comp. Gen. 513 (1992).

(2) Part day—A National Guard technician for a period of 5 days performed 4 hours of civilian duty each day followed by active military duty as part of year-round annual training authorized under 32 U.S.C. § 503. He is entitled to civilian pay without charge to leave for the 4 hours worked in a civilian capacity on the day he reported for military duty, with a charge of 4 hours annual leave or a full day of military leave under 5 U.S.C. § 6323(a) for the 4 remaining hours of the civilian duty day. In order for the technician to receive compensation from both civilian and military sources, 8 hours of annual leave or a full day of military leave is chargeable for the balance of the 5-day period, since no additional pay would result for the part-time performance of his civilian duties without a charge to leave. 52 Comp. Gen. 471 (1973).

A National Guard technician, who became subject to military control upon reporting for full-time training duty after completion of his civilian workday, is entitled under the principle stated in 49 Comp. Gen. 233 (1969) to his civilian pay without charge to leave for the day of reporting, even though he may be entitled to military pay for that day. However, since full-time training duty as a member of the National Guard constitutes active duty under 37 U.S.C. § 204(d), which is incompatible with civilian service, there is no entitlement under the rule in 37 Comp. Gen. 255 (1957) to civilian pay without charge to appropriate leave—military (under 5 U.S.C. § 6323(a)), annual, or leave without pay—for the days subsequent to his coming under military control, even though the duties of his military assignment were such that he was able to perform his civilian duty on those days. 52 Comp. Gen. 471 (1973). See also George McMillan, B-211249, September 20, 1983.

(3) Full day—A National Guard technician upon completion of his civilian workday departed for 2 weeks' full-time training duty. He returned home afterwards in a military travel status shortly after midnight and reported to his civilian position the same day. He is entitled to civilian pay without charge to military or civilian leave for the day of departure, since his civilian duties were performed before he became subject to military control. He is entitled to civilian compensation for the day he reported back to his civilian position, as he no longer was subject to military control. In addition, he is entitled to military pay incident to his return

travel from training as it is not incompatible with the performance of his civilian duties or the payment therefor after the termination of active military training duty. 52 Comp. Gen. 471 (1973).

(4) Minimum charge—There is no provision for charging military leave under 5 U.S.C. § 6323(a) in increments of less than 1 day. 52 Comp. Gen. 471 (1973).

(5) Use of annual leave—An employee may be granted annual leave in order to perform military training in excess of the 15 days of military leave provided under section 6323(a). See 49 Comp. Gen. 233 (1969), 47 Comp. Gen. 761 (1968), and 37 Comp. Gen. 255 (1957). However, an employee may not be granted annual leave on a nonworkday in lieu of military leave when military leave is exhausted in order to receive compensation for overtime work scheduled on a nonworkday. B-188145, November 15, 1977.

Under normal circumstances, an employee may not elect to use annual leave rather than military leave for days he is absent from his civilian employment while performing active military duty under orders at his own option. However, the employee may be involuntarily assessed annual leave, or leave without pay if appropriate, for the days he is absent from civilian employment to perform active duty for training after his military leave has been exhausted. In that situation his employing agency should ordinarily charge the first 15 days of active duty to military leave, and then charge the days of absence from employment for the performance of additional active duty to annual leave or leave without pay. George McMillan, B-211249, September 20, 1983.

(6) Full-time and field training—Employee of the District of Columbia was ordered to perform 20 days of full-time training duty and 15 days of annual field training as a member of the District of Columbia National Guard. Since full-time training duty directed under the authority of 32 U.S.C. § 502 is active duty, employee is entitled to military leave under 5 U.S.C. § 6323(a) for 15 days of the 20 days of such duty. Because the additional 15 days of annual field training was ordered under the authority of Title 39 of the District of Columbia Code, applicable specifically to the District of Columbia National Guard, he is entitled to military leave for that encampment under 5 U.S.C. § 6323(c). AND: Since holidays were included in these two periods and since the holidays in question were totally within the periods of absence on military leave, employee must be charged military leave for them. 60 Comp. Gen. 381 (1981).



Military leave was denied and annual leave was charged by the employing agency to a former employee of the Government Printing Office and member of the District of Columbia National Guard because the employee had used his 15-day annual allotment of military leave under 5 U.S.C. § 6323(a) during annual training. The employee, as a member of the D.C. National Guard, was also eligible to take military leave for annual training under 5 U.S.C. § 6323(c), which is not subject to the 15-day ceiling. In view of this, subsection 6323(c) leave may be substituted for subsection 6323(a) leave for annual training in order to cover the time he was charged annual leave. Thomas J. Callahan, B-218763, November 26, 1985.

Military leave should be charged on a calendar-day basis rather than on a workday basis despite disparate results based upon the type of schedule worked by the employee, and regardless of the type of schedule the employee may work, military leave may not be charged in increments of less than 1 day. National Guard Technicians, 64 Comp. Gen. 154 (1984).

b. Under section 6323(c)

(1) Standby time—The term “full-time military service for his State” contained in 5 U.S.C. § 6323(c) for federal employees performing active service in the aid of law enforcement as members of a reserve component of the armed forces or the National Guard, includes the time from reporting when so ordered by competent authority to serve in the active military service of the state until relieved by proper orders. It also includes any standby time necessitated by the need for the employee to take over or perform when his active service or skill is needed, as well as actual engagement in law enforcement duties. 49 Comp. Gen. 233 (1969).

(2) Use of annual leave—A federal employee who as a member of a reserve component of the armed forces or National Guard is entitled to 22 workdays of leave in a calendar year pursuant to 5 U.S.C. § 6323(c) for periods of active duty in aid of law enforcement may be granted annual leave or unused military leave under 5 U.S.C. § 6323(a) only if section 6323(c) leave is exhausted. Under section 6323(b), an employee entitled “to leave without loss of or reduction in . . . leave” may not elect to use, nor may he voluntarily be charged annual leave, or any other type of leave for periods of service in the aid of law enforcement if he has section 6323(c) leave available for use, even to avoid a forfeiture of leave. 49 Comp. Gen. 233 (1969). See also Charles W. Haas, B-212851, January 4, 1984.

c. Waiver

An employee who had accumulated 16 days of military leave was erroneously granted 28 days of military leave over a 2-month period. His indebtedness for use of 12 days of excess military leave is subject to waiver under 5 U.S.C. § 5584 (1982), but we conclude that waiver is not appropriate under the circumstances. James J. Serpente, 68 Comp. Gen. 104 (1988).

An employee called to military duty to participate in Operation Desert Storm requested to be placed in a leave without pay status. However, the agency erroneously placed him on annual leave and paid him his salary for 80 hours. Upon discovery of the error, the agency gave the employee the option of keeping the payment and the charge to his leave or having the leave reinstated and being billed for the payment. The employee chose to have the leave reinstated. Collection of the resulting debt for the annual leave payment is not against equity and good conscience nor against the best interests of the United States in these circumstances since the employee elected to have the leave restored with the knowledge that this would create a debt. Therefore, the debt is not eligible for waiver under 5 U.S.C. § 5584. Larry Jamerson, B-248732, July 28, 1992.

6. Offset of civilian salary

Where a statute specifically refers by section number to another statute, they are interpreted as of the time of adoption, without subsequent amendments, in the absence of a contrary legislative intent. Therefore, under the current code, the salary offset provision in 5 U.S.C. § 5519 (1988) applies to amounts received by reservists and national guardsmen while on military leave to enforce the law under 5 U.S.C. § 6323(b) (1988), but salary offset does not apply to leave under 5 U.S.C. § 6323(c) (1988) for District of Columbia National Guardsmen ordered or authorized to serve in parades or encampments even though section 5519 literally refers to section 6323(c). Reservists and National Guard Members, 70 Comp. Gen. 1 (1990).

7. Carry over and use in next fiscal year

In light of the 1980 amendment to the military leave statute, 5 U.S.C. § 6323(a), federal employees who are members of the Reserve or National Guard are now entitled to carry over up to 15 days of unused military leave into the next fiscal year. When the carried over leave is combined with the

15 days accrued in the new fiscal year, it produces a maximum military leave benefit of 30 days which may be used in one fiscal year. Employees may be continued in military leave status on leave they had to their credit in the fiscal year they entered active duty although the military duty to which the leave is applied extends into the next fiscal year. No return to civilian status is necessary. Decisions to the contrary [10 Comp. Gen. 102 (1930), 10 Comp. Gen. 116 (1930), 11 Comp. Gen. 469 (1932), 12 Comp. Gen. 241 (1932), 17 Comp. Gen. 174 (1937), 29 Comp. Gen. 269 (1949), 35 Comp. Gen. 708 (1956), 40 Comp. Gen. 186 (1960), 41 Comp. Gen. 320 (1961), 51 Comp. Gen. 23 (1971)] are no longer applicable. Accrual and Charging of Military Leave, 70 Comp. Gen. 263 (1991). This decision was amplified in 71 Comp. Gen. 513 (1992), immediately below.

Federal employees who are members of the Reserve or National Guard serving on active military duty which extends into a second or succeeding fiscal year may accrue and use the 15 days of military leave which accrue at the beginning of the second and each succeeding fiscal year without return to civilian status. 70 Comp. Gen. 263 (1991), amplified. Military Leave, 71 Comp. Gen. 513 (1992).

When an employee who is a member of the Reserve or National Guard serves on an extended period of active duty that spans two or more fiscal years, such as Operation Desert Shield/Storm, military leave need not be charged for intervening nonworkdays occurring between the beginning of the second or subsequent fiscal year and the date on which the employee begins to use military leave. Each fiscal year may be considered separately for charging periods of military leave under 5 U.S.C. § 6323(a). However, once use of military leave is begun, it must be charged on a calendar day basis including intervening nonworkdays. Military Leave, 71 Comp. Gen. 513 (1992).

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## E. Home Leave

### 1. Generally

Home leave for federal employees stationed outside the United States is authorized by 5 U.S.C. § 6305(a), with implementing regulations found at 5 C.F.R. §§ 630.601-630.607. Only those employees who qualify for the maximum annual leave accumulation of 45 days under the provisions of 5 U.S.C. § 6304(b) are eligible for home leave. Home leave may be used only in the United States, the Commonwealth of Puerto Rico, or the territories and possessions of the United States. An employee is eligible for home

leave entitlements only when he has completed 24 months of continuous service abroad. 5 U.S.C. § 6305(a).

An employee of the Department of Agriculture was recruited from her place of permanent residence in the continental United States for assignment in Puerto Rico and was thus eligible to accrue the 45 days of annual leave authorized by 5 U.S.C. § 6304(b)(1) for individuals recruited or transferred from the United States or its territories or possessions for employment outside the area of recruitment or from which transferred. 62 Comp. Gen. 545 (1983).

Since she qualified for the maximum annual leave accumulation of 45 days under 5 U.S.C. § 6304(b)(1), and completed a basic period of 24 months continuous service abroad, Agriculture employee was entitled to accrue home leave under 5 U.S.C. § 6305(a) on the basis of her continuous service. Although the rate at which she earned home leave was subject to the agency's interpretation of implementing regulations at 5 C.F.R. § 630.604, the agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted. 62 Comp. Gen. 545 (1983).

The agency's policy which purports to deny the 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in the continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements. 62 Comp. Gen. 545 (1983).

An employee who executed an agreement to remain in the service of the IRS in Puerto Rico for 24 months but who obtained an appointment in Puerto Rico with HUD only 5 months later, did not satisfy the terms of his original agreement by remaining with HUD for an additional 19 months. Based on information evidencing his intent to relocate to Puerto Rico on a permanent basis, HUD properly determined that the employee's residence at the time of his appointment was Puerto Rico. Therefore, since his place of residence was the same as his post of duty, his employment in Puerto Rico does not constitute "service abroad" under 5 U.S.C. § 6305(a). Because of that residency determination he was not given a return travel agreement and therefore, he fails to meet the condition of 5 U.S.C. § 6304(b)(2)(ii) for

entitlement to a 45-day leave ceiling. Miquel Caban, 63 Comp. Gen. 563 (1984).

2. In a foreign country

Since home leave may be used only in the United States, the Commonwealth of Puerto Rico, or the territories and possessions of the United States, a Foreign Service employee may not be granted home leave in the Panama Canal Zone which, through the Panama Canal Treaty of 1977, is under the full sovereignty of Republic of Panama. 59 Comp. Gen. 671 (1980).

3. Erroneous grant of home leave

Navy employee who was hired locally, in Guam, was erroneously granted home leave. Upon employee's retirement, Navy reconstructed annual leave account and charged employee's account with number of days of home leave taken. Employee is entitled to waiver of home leave erroneously granted and used. Annual leave account is recredited with number of days charged to it for home leave. B-201358, August 24, 1981.

4. Entitlement

a. Minimum service requirement

(1) After erroneous separation—An employee was separated in a reduction-in-force action from a position with the Trust Territories of the Pacific Islands prior to the completion of 2 years' service at that post. The separation was found to be invalid, and he was ordered reinstated to his prior position or an equivalent position. He accepted a position with the Bureau of Reclamation in Denver. He is entitled, under 5 U.S.C. § 5596, to count the time he did not spend at his foreign post due to his erroneous separation for the purpose of fulfilling the 24 months' overseas service requirement. However, the limitations imposed on granting home leave by 5 C.F.R. § 630.606(c) disqualified the employee from using his home leave until he has served another qualifying period overseas. 52 Comp. Gen. 860 (1973).

(2) Temporary duty in the United States—To be eligible for the home leave travel allowances prescribed for an employee who satisfactorily completes an agreed upon period of service the employee must have completed a minimum of 12 months of service following the date on which he arrives at

or returns to his overseas post of duty. Therefore, an agency may not regard an agreed upon period of overseas service as commencing on the date the employee is assigned to training or temporary duty in the United States following completion of home leave and credit the employee with the time spent in training toward the fulfillment of the agreed upon period of service. 49 Comp. Gen. 425 (1970).

(3) Effect of break in service—A school teacher after serving for 1 year in the Pacific Islands resigned and departed for the continental United States. She must complete a new period of 24 months' continuous service overseas before being eligible for a grant of home leave. Title 5, U.S.C. § 6305(a) and 5 C.F.R. § 630.606(a) provide that a basic service period of 24 months of continuous service abroad is required for home leave, and a continuous period is terminated by a break in service. B-159334, July 29, 1966.

(4) Administrative discretion—The disallowance of a claim for reimbursement for accrued home leave or the credit of such leave to the employee's annual leave account is affirmed, since the legal authority for home leave provides only for its use as such at the discretion of an agency. Moreover, the provisions of 5 U.S.C. § 6304(d)(1)(A) regarding the restoration of forfeited annual leave are not applicable, since no forfeiture is established on the record. 54 Comp. Gen. 349 (1974).

Although the granting of home leave is basically for each agency's determination, the Army's refusal to grant it to an employee who had completed his basic service period required for home leave entitlement under 5 U.S.C. § 6305, solely on the grounds that the employee had refused to sign a transportation agreement, appears fundamentally discriminatory. The right to return travel had already been earned and home leave itself is not forfeited even if the employee refuses to sign a transportation agreement. B-170250, October 23, 1970.

The determination as to when and in what amount home leave will be granted is a matter for administrative determination. 62 Comp. Gen. 545 (1983).

b. Return to overseas post requirements

(1) Agency determination—An overseas employee serving in Bangkok was transferred to St. Croix, Virgin Islands, but was not authorized home leave. While 5 U.S.C. § 6305(a) and the implementing regulations provide that an

employee may be granted home leave after 24 months' continuous service outside of the United States, they also provide that home leave will be granted only when it is planned that the employee will complete another tour of duty abroad. Here it was administratively determined that the employee would not complete another tour abroad. B-163364, April 6, 1971.

The Army has requested our decisions concerning its interpretation of the home leave regulation, 5 C.F.R. § 630.606(c)(2) (1987). The Army may grant home leave during an employee's period of service abroad, or within a reasonable period after the employee's return from service abroad when it is contemplated, i.e., expected, that the employee will return to service abroad immediately or on completion of a permanent assignment in the United States. Lagatta and Shaffer, B-226306, May 12, 1988.

(2) Agency intent—An employee's separation in a reduction-in-force action from a position with the Trust Territories of the Pacific Islands prior to completion of 2 years' service was found to be invalid. He was ordered reinstated to the same position or an equivalent position, and accepted a position with the Bureau of Reclamation in Denver. He is entitled pursuant to 5 U.S.C. § 5596 to home leave credit authorized under 5 U.S.C. § 6305(a), and may count the time he did not spend at his foreign post due to his erroneous separation for purposes of fulfilling the 24 months' overseas service requirement. However, limitations imposed on the granting of home leave disqualified the employee for home leave at the time he accepted the Denver position, since there was no intent to return him overseas. 52 Comp. Gen. 860 (1973).

(3) Transferred to Alaska—Under 5 U.S.C. § 6305, a federal employee generally is entitled to home leave if he has completed a basic service period of 24 continuous months abroad and it is contemplated that he will serve another tour of duty abroad. Thus, when an employee served 24 months in Puerto Rico and transferred to Alaska, he erroneously was granted home leave because under 5 U.S.C. § 6301, Alaska is not an assignment abroad. While home leave was erroneous, the pay received while on home leave may be waived under 5 U.S.C. § 5584. 56 Comp. Gen. 824 (1977).

(4) Transferred to CONUS—An employee who completed an overseas assignment and was transferred back to the continental United States apparently believed he was entitled to home leave. However, it is not completion of an assignment but rather contemplation of another period

of duty abroad that is required for authorized home leave. See 5 C.F.R. § 630.606(c). Therefore, the employee is not entitled to home leave. B-192199, January 31, 1979.

(5) Failure to complete service under new agreement—An employee who had been stationed in Montreal, Canada, for 2 years, used home leave to perform renewal agreement travel. She then returned to her duty station in Montreal for approximately 18 months before transferring to a position in the United States. The employee is not indebted for home leave since she had served in Montreal for a continuous period of 24 months prior to the home leave, the agency allowed home leave with the expectation that she would return for further duty in Montreal and she did, in fact, return to Montreal immediately after using home leave. Her entitlement is not affected by her failure to complete a 2-year service agreement she signed before departing Montreal on home leave. Virginia M. Borzellere, B-214066, June 11, 1984. See also Ann McCarthy, B-216935, September 17, 1985.

## F. Leave Without Pay

### 1. Generally

Leave without pay is a temporary nonpay status and absence from duty which, in most cases, is granted at the employee's request. It does not include nonpay status on days for which the employee would be paid on an overtime basis and does not include days on which the employee is not scheduled to work. FPM Chapter 630, Subchapter 12 and FPM Supp. 990-2, Book 630, Subchapter 12.

### 2. Use results in forfeiture of annual leave

Where an employee has excess annual leave subject to forfeiture, he should not be carried in a leave without pay (LWOP) status. Where LWOP has been erroneously granted, annual leave should be substituted to avoid forfeiture. B-194176, January 3, 1980. See also 23 Comp. Gen. 677 (1944) and 22 Comp. Gen. 178 (1942).

### 3. Administrative discretion

The authorization of leave without pay is solely a matter of administrative discretion, and employees cannot demand it as a matter of right, except in cases of (1) disabled veterans in need of medical treatment, and (2) reservists and National Guardsmen performing military training duties.



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See FPM Chapter 630, S12-2 and FPM Supp. 990-2, Book 630, S12-2. See also 54 Comp. Gen. 154 (1974).

4. Involuntary charge

a. Employee refuses to report for duty

Where an agency relocated its offices and during the transition bused employees to the new offices within normal working hours, the agency may place an employee on leave without pay where the employee refused to be bused to the new offices and, thus was considered to be unjustifiably refusing to report for duty as assigned. B-186095, April 26, 1976; and B-159542, July 21, 1966.

b. Employee incapacitated for duty

When an employee is determined to be incapacitated for the performance of assigned duties, he may be involuntarily placed on leave without pay. B-186197, July 28, 1976; B-181313, February 7, 1975, and May 6, 1977; and B-206237, August 16, 1982.

c. Disability retirement

Recommendations on granting leave without pay pending settlement of an employee's claim for disability retirement are contained in FPM Supp. 831-1. An agency may, under conditions set forth in 5 C.F.R. § 831.1206, place an employee on leave with or without his consent when the agency has filed an application for disability retirement. Such action does not constitute an unjustified or unwarranted personnel action under 5 U.S.C. § 5596. 41 Comp. Gen. 774 (1962); B-184522, March 16, 1976, and April 21, 1977; B-184706, January 12, 1976; and B-206237, August 16, 1982.

5. Federal employees' compensation

Leave without pay may be granted to an employee pending action on a claim for disability compensation under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8151, and may be substituted for annual and/or sick leave previously charged when disability compensation is granted for a work-related illness or injury. 32 Comp. Gen. 310 (1953); B-180010.12, March 8, 1979; B-187104, March 8, 1978; B-182608, August 9, 1977; B-184008, March 7, 1977; B-166538, April 28, 1969; and B-112786,

January 26, 1953. See also FPM Chapter 630, S12-2(b)(4)(d) and FPM Supp. 990-2, Book 630, S12-2(b)(5)(e).

6. Disability retirement

In order to increase his annuity, an employee of the Air Force who retired on disability in 1976 requested that he be allowed to waive and refund compensation received during a period of disability and be placed on leave without pay. The effect would be to push back the date of retirement to 1974. Refund may not be accepted because there is no authority for an employee to waive and refund compensation when the salary for his position is fixed by or pursuant to legislative authority. B-189897, September 5, 1978.

An employee, who was on leave and approved LWOP pending a determination on his application for disability retirement, including his unsuccessful appeal of the denial of his application, may not have leave recredited or receive backpay since the record does not indicate that his placement on leave and LWOP was involuntary or that he was ready, willing, and able to work during that period. B-128314, January 8, 1979.

7. Substitution of leave without pay

a. For annual leave

A reemployed annuitant may not have LWOP retroactively substituted for annual leave because once an employee elects to use annual leave, the obligation of the United States is discharged and cannot be changed in the absence of a law or regulation so providing. Furthermore, agency policy of requiring the use of annual leave before leave without pay precludes the requested substitution. B-188242, August 9, 1977.

b. For sick leave

(1) Administrative error—A terminally ill employee who applied for disability retirement and waived his military retired pay, neglected to request LWOP and died while in a sick leave status prior to approval of the disability retirement. The failure to request LWOP resulted in a substantially lower survivor annuity to the employee's widow. Since the failure to request LWOP resulted from the employee's mistaken belief that he had performed all actions necessary to maximize the annuity, the agency may retroactively substitute LWOP for sick leave. B-190204, January 26, 1978.

However, where there are no counseling errors or misunderstandings on the part of the employee, LWOP may not be retroactively substituted for sick leave. 58 Comp. Gen. 661 (1979), distinguishing B-190204, January 26, 1978.

(2) Premature retirement—Generally, an employee's separation date may not be changed except where the separation did not conform to the intention of the parties due to a bona fide mistake. Thus, an employee who retired voluntarily after erroneous advice regarding life insurance and who would have otherwise delayed her retirement may be retroactively restored to the rolls in an LWOP status in order to obtain the required creditable service. B-187596, December 15, 1976.

## G. Miscellaneous

### 1. Compensatory time for religious holidays

Under the provisions of 5 U.S.C. § 5550a, employee may work overtime and earn compensatory time for religious observances requiring the employee's absence from work.

### 2. Voluntary leave sharing

In 1988 a voluntary leave sharing program was created. 5 U.S.C. §§ 6331-6373.

### 3. The Family and Medical Leave Act of 1993

5 U.S.C. §§ 6381-6387 authorizes limited unpaid leave for certain family and medical purposes.



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