



UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General

Memorandum

May 13, 2010

To: Carol A. Arbogast
Director of Human Resources

From: David P. Berry
Inspector General

A handwritten signature in black ink, appearing to read "D. P. Berry", written over the printed name of the Inspector General.

Subject: Inspection Report No. OIG-INS-58-10-01: Restoration of Annual Leave

We initiated this inspection in November 2009 to determine whether requests to restore annual leave were processed in accordance with Federal laws and regulations and whether requests were processed in accordance with the National Labor Relations Board's (NLRB or Agency) policies and procedures.

OVERVIEW

Overall, we determined that the Agency has a sufficient process and policies for restoration of annual leave. We do believe, however, that there is a certain amount of abuse that could be addressed by a more rigorous compliance with the existing policies.

For leave years 2007 and 2008, the Agency approved 36 out of 39 requests for restoration of annual leave, restoring more than 2,600 hours of forfeited annual leave. The justification for the vast majority of this leave was that an exigency of public business existed that did not allow the employee to take previously scheduled annual leave.

Our findings question whether 1,447.50 hours of restored annual leave met the statutory requirements of an exigency of business. We also identified abuses in the leave restoration process. Those abuses included an apparent scheme to accumulate the maximum possible leave prior to retirement to receive the maximum lump sum payment upon retirement and restoring leave that was not previously scheduled. We also found a limited number of administrative processing issues. We did not identify any employees who maintained a restored leave balance beyond the time limit for use.

BACKGROUND

Generally, Federal employees earn annual leave each pay period. If not used, an employee can accumulate annual leave and carry it over from leave year to leave year. A leave year begins on the first day of the first full biweekly pay period in a calendar year and ends on the day immediately before the first day of the first full biweekly pay period in the following calendar year. The amount of leave that can be carried over to a new leave year, however, is limited by statute to 240 hours for employees in grades to GS-15 and 720 hours for employees in the Senior Executive Service (SES). The limit for SES members was set on the first day of the first pay period beginning after October 13, 1994, and SES personnel are allowed a "personal ceiling" that may exceed the statutory limit if they had accumulated more than 720 hours of annual leave on that date.

If an employee's annual leave exceeds the carryover limits, the employee forfeits the leave. There is a statutory provision that allows an agency to restore forfeited annual leave if the employee can demonstrate that the annual leave was lost because of administrative error, exigencies of public business when annual leave was scheduled in advance, or sickness of the employee when annual leave was scheduled in advance. Once restored, annual leave must be used no later than the end of the leave year ending 2 years after the date the exigency ended or the date the employee is determined to be recovered and able to return to duty if the leave was forfeited because of sickness. Both the Office of Personnel Management (OPM) and the Agency have issued policies that implement these statutory provisions and establish procedures to avoid the unnecessary accumulation of annual leave.

FINDINGS

RESTORATION OF LEAVE

Leave Restored With No Exigency of Public Business

Federal regulations state that for annual leave to be restored, a determination must be made that an exigency is of such a major importance that the annual leave may not be used. Agency guidance states that an exigency of public business means an emergency-type workload situation that could not be foreseen when the supervisor initially approved the leave. Examples provided by this guidance include unforeseen court dates, workload crises, or other critical deadlines outside of those associated with a normally anticipated workload. The guidance also provides examples of situations that are not an exigency that include a continuing heavy office workload or the normal fluctuation in workload that can be expected by the nature of the work performed.

We found that 1,031.75 hours for 2007 and 415.75 hours for 2008 of annual leave were restored for reasons that do not appear to meet the "emergency" situation that was unforeseen at the time the leave was approved. Although there is discretion when making an assessment of what may be an "emergency," our assessment of the justifications provided in the restoration requests, as outlined in the tables below, appear to fall into routine or normal duties performed

during a time of foreseeable events or circumstances, rather than unforeseen or crisis situations as outlined in the guidance.

LEAVE YEAR 2007

Employee	A/L Restored	Summary of Justification
SES Manager	208	Understaffing and lack of experienced supervisors
HQ Manager	9	SES performance appraisals and Performance Review Board (PRB)
Field Professional	49.5	Routine casehandling duties to meet end of month targets
HQ Professional	62.5	Preparation of a yearly report
Field Attorney	96	Routine casehandling duties – specifically, preparation of a brief
Support Staff	40	Clerical services for cases at year-end
HQ Attorney	22.75	Routine casehandling duties and preparing for training
Field Manager	208	Routine casehandling duties and supervisory duties in an understaffed office
SES Manager	68	Routine casehandling duties, training, American Bar Association meeting, and PRB
SES Manager	76	Routine casehandling duties, SES performance appraisals, and Combined Federal Campaign (CFC) duties
Field Professional	192	Understaffing, routine casehandling duties, CFC duties, disaster preparedness training, first aid training, and fire drill

LEAVE YEAR 2008

Employee	A/L Restored	Summary of Justification
HQ Manager	48.5	SES performance appraisals and PRB
HQ Manager	33.25	Routine casehandling duties and other obligations
Field Manager	8	Routine casehandling duties and understaffing
Support Staff	32	Management approved A/L for both office clericals

Employee	A/L Restored	Summary of Justification
Support Staff	70	Clerical duties for cases at year-end
HQ Attorney	24	Routine casehandling duties
Field Manager	80	Routine casehandling duties and staffing
Support Staff	120	Clerical duties for cases at year-end

Restored Leave for Federal Holidays

By Executive Orders, Federal executive agencies were closed and their employees were excused from duty on December 24, 2007 and December 26, 2008. OPM guidance issued in response to these Executive Orders states that if an employee has scheduled "use or lose" annual leave for the time that they were excused from duty and are unable to reschedule that leave for use before the end of the leave year, the leave will be forfeited. OPM guidance also states that when "use or lose" leave is forfeited under these conditions, it may not be restored.

Employees were restored 112 hours of annual leave that was scheduled, but not taken, on the days that employees were excused from duty by the Executive Orders. Four employees received restored annual leave for leave that was forfeited when it was not used on December 26, 2008, and 10 employees received restored annual leave for leave that was not used on December 24, 2007.

Another employee was scheduled to take 8 hours of annual leave on December 24, 2007 and December 26, 2007. On December 12, 2007, after the Executive Order was issued, the employee submitted a new annual leave request for 8 hours on December 26, 2007 and December 28, 2007. The employee's 16 hours of annual leave was then canceled and forfeited. The leave was later restored.

Although the 8 hours of forfeited annual leave scheduled for December 26, 2007, was eligible for restoration, the other 8 hours was not eligible. The leave was not eligible for restoration because if it is considered leave that was scheduled for December 24, 2007, the guidance states that the statute prohibits its restoration, and if the leave was considered scheduled for December 28, 2007, it was scheduled after the required date.

Scheduling Annual Leave

NLRB Administrative Policies and Procedures Manual (APPM) Chapter PER-10 states, in the section describing management's responsibilities, that leave schedules should be established early in the leave year to ensure that all employees are given an opportunity for a reasonable vacation and for using any leave they would otherwise forfeit at the end of the leave

year. Leave schedules should be reviewed periodically and modified according to work requirements.

We found 12 instances in which employees requested and were approved leave near the end of the year, only to have the leave apparently canceled and the employee report for routine or normal duties. These employees either did not schedule their leave throughout the leave year or carried over large restored leave balances from the prior year. As a result of either situation, the employees accumulated such a large pool of available leave that forfeiture and restoration becomes almost self-perpetuating.

For leave year 2008, five employees scheduled between 120 and 208 hours of annual leave from mid-November to the end of the leave year. A sixth employee scheduled 192 hours of annual leave from October 20 to December 19, 2008. For leave year 2007, six employees scheduled between 120 and 230 hours of annual leave from mid-November to the end of the leave year. In both years, all or a portion of the leave was apparently canceled and then restored.

Given the history of the leave usage of these employees and the justification for the restoration of forfeited leave, we question whether all of the large end-of-year leave requests were in fact bona fide leave requests.

ABUSES

Payout to Employee at Retirement

A manager in a Regional Office carried over the maximum 240 hours of leave from leave year 2006 to leave year 2007. On September 10, 2007, the manager requested and was approved to use annual leave from November 19 through December 28, 2007, a total of 230 hours. The leave was then canceled shortly before November 19, 2007. As a result, during leave year 2007, the manager did not use any of the 208 hours of annual leave that he accrued in that leave year resulting in a leave balance of 448 annual leave hours at the end of leave year 2007. The 208 hours of annual leave he accumulated in leave year 2007 were then forfeited and restored – the basis being exigency of public business. In leave year 2008, the manager used 1 hour of annual leave. The manager retired on January 2, 2009, with a combined balance of 655 hours of annual leave and restored annual leave. The total value of the leave at the time of the manager's retirement was \$48,083.55, of which \$15,269.28 was for restored annual leave.

The reason for the cancelation of the leave in 2007 was exigency of public business as evidenced by his duty to supervise all Representation case (R case) work in the office, that he was the only person in the office who is fully knowledgeable concerning R case procedures, and a general lack of staff and supervisory employees.

We reviewed the Region's R Case Monthly Performance Reports for calendar years 2006 and 2007 and compared them to the manager's leave use. During 2006, the Region had 99 R cases, and the manager used 180 hours of annual leave. During 2007, when no annual leave was

used, the Region had 65 R cases. As compared to the last 3 months of 2006, the R case intake during the last 3 months of 2007 decreased by 43 percent.

Both of the other managers in the Regional Office used consistent amounts of annual leave during the same 2-year period. We also noted that the manager who was restored leave worked a compressed 5-4-9 schedule – providing 26 workdays off. The manager's schedule was not altered during the period of time that the exigency of public business allegedly precluded his use of leave. The request to restore the leave notes the manager's presence in the Regional Office was required because other employees had leave scheduled and one employee who could perform the manager's duties prefers not to do so. The request also notes that the Regional Director will be on leave during part of the time, and the manager will be needed as the Acting Regional Director.

Under these circumstances, we question whether the September 10, 2007, leave request was a bona fide request and find the request for approval of the restoration of annual leave to be an abuse of discretion by the Regional Director. It is apparent from the facts that the field manager engaged in a scheme to accumulate the maximum possible leave prior to retirement to receive the maximum lump sum payment upon retirement.

No Prior Scheduling of Leave

Federal regulations state that for forfeited annual leave to be restored, the use of 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. For an SES field manager, we could find no evidence that a request to use 208 hours of annual leave from November 21, 2007 through December 28, 2007, was approved or that it was canceled.

Normally, the leave for SES field managers is approved when the field managers designate an acting manager for the period during the absence and notifies the Division of Operations-Management. SES field managers also generally send a leave request form to the Division of Operations-Management. Those forms are maintained in binders separated by Regional Office. We could find no evidence that the proper notification of the acting designation was made or the leave request was forwarded to the Division of Operations-Management. What we did find was that on December 17, 2007, 27 days after the leave allegedly started, the manager sent an e-mail message to the Division of Operations-Management stating that he could not take the leave. Under these circumstances, there was no basis to restore the forfeited leave.

ADMINISTRATIVE ISSUES

Submissions Missing Required Information

APPM Chapter PER-10 states that leave restoration requests must include the beginning and ending date of the exigency and factors prohibiting the employee from using the annual leave. Annual guidance for restoration requests specifically requires the reason(s) why the canceled leave could not be rescheduled prior to the end of the leave year.

The ending date of an exigency is important because it is used to establish the date that the restored leave expires. The reason the leave could not be rescheduled is necessary for the deciding official to determine whether the leave should be restored. The following table shows the frequency of the missing information for each year.

	Leave Year 2007	Leave Year 2008	Total	Percent
Requests approved	22	14	36	
Ending date of exigency not included	16	7	23	64%
Reason annual leave could not be rescheduled by the end of the leave year not included	11	6	17	47%

Determinations Missing Required Date

APPM Chapter PER-10 states that leave restoration determinations on approved requests will include a date by which the restored leave must be used. None of the approval determinations in either year included the date by which the leave must be used. This information is needed so that employees can manage their leave.

An example of why the date is important involves an employee who submitted seven leave slips to use 44 hours of restored annual leave in leave year 2009. On September 28, 2009, the employee's manager requested that the payroll service provider reclassify 44.5 hours that had been charged as restored annual leave to annual leave. Prior to the correction, the employee accumulated enough annual leave that the amount of her potential annual leave forfeiture was 207 hours. As a result of the reclassification, the amount of annual leave that the employee could potentially forfeit was reduced to 162.5 hours.

When we questioned the employee about the correction, she told us that when she was absent, she intended to use the restored leave because she thought it would expire at the end of the 2009 leave year. According to the employee, she contacted the payroll service provider and learned that her restored annual leave would not actually expire until the end of the 2010 leave year. Providing the date that the restored annual leave must be used in the determination memorandum could have allowed the employee and manager an opportunity to better manage the employee's leave and avoid the need for the correction.

In comments to the draft of this report, the Human Resources Branch responded that the date by which the restored leave must be used is now included as part of the leave restoration determination.

Request Approved by a Deputy without a Reference to Delegated Authority

APPM Chapter PER-10 states that, except for employees of the Human Resources Branch, the Director of the Human Resources Branch has the authority to approve or deny a

request for restoration of forfeited annual leave. For requests from employees in the Human Resources Branch, the approving official is the Director of Administration.

A Human Resources Branch employee's request for restored leave was approved by the Deputy Director of Administration, rather than the Director of Administration as required by the Agency's policy. This request was for 48.50 hours of annual leave for leave year 2008. The Deputy Director stated to us that there was no delegation of authority, but the Director was aware of the request and approval. The better practice would have been for the Deputy Director to have indicated her authority when signing the leave restoration determination.

Field Office Submissions Not Through Operations-Management

The APPM states that for field employees, a copy of the request should be sent through the appropriate Assistant General Counsel in the Division of Operations-Management. For leave years 2007 and 2008, there were 17 field employee requests. For 12 of 17 of these requests, the Human Resources Branch files contained no documentation that the requests were sent through the Division of Operations-Management.

Documentation Created After the Fact

The Government Accountability Office's Standards for Internal Control in the Federal Government state that transactions should be promptly recorded to maintain their relevance and value to management in controlling operations and making decisions. We identified two instances in which management decisions were documented well after the fact, but were made to appear as if they were created when the action occurred.

In one instance, a manager backdated her written disapproval of an employee's leave request. The manager signed the document on February 11, 2008, but dated it November 27, 2007, the date she orally disapproved the leave.

In another instance, a manager created a memorandum that she would only permit the employee "to take only 40:00 hours of the total amount of hours of annual leave that she applied to use beginning November 17, 2008. She will take that leave from November 24, 2008 through and including December 31, 2008." The text of the memorandum appears as if it was made at the time of the decision; however, the memorandum is dated February 23, 2009. The manager stated to the OIG that she created the memorandum so that it could be submitted with the employee's leave restoration request, which was also dated February 23, 2009.

MANAGEMENT'S COMMENTS

The Human Resources Branch provided meaningful comments that we have incorporated, as appropriate, into this report. In those comments, they noted that the responsibility for compliance with the statutory and regulatory requirements and the Agency's guidance lies with the entire Agency and, specifically, those offices that are likely to be subject to emergency requirements.

We concur with the message that the Human Resources Branch is providing to the Agency. The ability to control the forfeiture and restoration of annual leave begins with the proper administration of the use of annual leave through compliance with the Agency's guidance that managers and supervisors establish leave schedules early in the leave year to ensure that all employees are given an opportunity for a reasonable vacation and for using any leave they would otherwise forfeit at the end of the leave year.

SCOPE

We reviewed laws, regulations, and OPM guidance regarding restored annual leave. We also reviewed Agency guidance including APPM, Chapter PER-10, Leave and Attendance, dated December 21, 1998, and administrative bulletins issued annually to provide guidance for restored leave requests.

We interviewed and obtained documentation from members of the Human Resources Branch. We reviewed the documentation provided to determine whether the restoration of leave was supported by evidence and in conformance with Federal laws and regulations and Agency policies. We also performed tests to determine whether restored leave was either used in a timely manner or expired.

This inspection evaluated leave that was restored during calendar years 2008 and 2009 for annual leave that expired for leave years 2007 and 2008. This review was done in accordance with Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency.

SUGGESTIONS

We suggest that the Director of Human Resources:

1. Ensure compliance with the statutory and regulatory requirements and Agency guidance in making determinations on requests for the restoration of forfeited annual leave;
2. Provide training to the managers on:
 - a. Their responsibility to ensure that schedules are established early in the leave year to ensure that all employees are given an opportunity for a reasonable vacation and for using any leave they would otherwise forfeit at the end of the leave year; and
 - b. The statutory and regulatory requirements and Agency guidance for restoring forfeited annual leave.