



April 4, 2019

**VIA E-MAIL AND FIRST-CLASS MAIL**

Mr. Robin Bailey  
Human Capital Officer  
Internal Revenue Service  
OS:HC:IR Room 3513  
1111 Constitution Avenue, NW  
Washington, DC 20224

**Re: National Grievance – Restoration of “Use or Lose” Annual Leave Forfeited  
because of the December 2018 to January 2019 Lapse in Appropriations**

Dear Mr. Bailey:

Pursuant to Article 42, Section 4 of the parties’ 2019 National Agreement, the National Treasury Employees Union (NTEU) hereby files this national grievance over the Internal Revenue Service’s (IRS) determination that bargaining unit employees’ “use or lose” annual leave forfeited due to the December 22, 2018–January 25, 2019 lapse in appropriations would not be restored because it had not been “scheduled and approved” by a manager by November 24, 2018. This grievance is filed on behalf of all impacted IRS bargaining-unit employees and NTEU’s institutional rights.

On December 18, 2018, the President signed an executive order excusing executive branch employees from work without charge to leave on December 24. On December 22, 2018, portions of the federal government shut down due to a lapse in appropriations. Employees affected by the lapse, including bargaining unit employees, were either furloughed or required to work without pay through January 25, 2019, the last day of the partial government shutdown. As a result, some lapse-affected employees, including numerous bargaining unit employees, forfeited “use or lose” annual leave that they planned to use and/or donate to the Leave Sharing program during the last pay period of 2018. Additionally, bargaining unit employees who planned to take “use or lose” leave on December 24 were unable to reschedule that leave for another date prior to January 5, 2019, the end of the 2018 leave year. Thus, those employees forfeited the “use or lose” leave scheduled for December 24.

Article 48, Section 1E of the National Agreement governs the treatment of “use or lose” leave during a shutdown caused by a lapse in appropriations. It states:

*If an employee has “use or lose” leave scheduled during the furlough, the employee and his/her manager shall make every reasonable effort to reschedule the expiring leave during the leave year. In the event that it cannot be rescheduled, the shutdown will qualify as an exigency of the public business and the forfeited leave may be restored in accordance with IRM 6.630.1.3.3.*



5 U.S.C. § 6304(d)(1), which governs “use or lose” annual leave government-wide, states that “[a]nnual leave which is lost by operation of this section because of . . . exigencies of the public business when the annual leave was scheduled in advance . . . shall be restored to the employee.” (emphasis added). 5 CFR § 630.308(a) establishes that “use or lose” annual leave is scheduled in advance if it is scheduled “in writing before the start of the third biweekly pay period prior to the end of the leave year,” which in this instance fell on November 24, 2018. As the U.S. Office of Personnel Management (OPM) advised in CPM 2019-02, “as long as the leave was properly scheduled in advance, agencies must restore any annual leave that was forfeited because of the lapse in appropriations.” (emphasis added). In CPM 2019-06, OPM further advised that “the ‘in writing’ requirement may be met in various ways, including electronic communications such as email, electronic calendar scheduling, or submissions to a time and attendance system.”

On or about April 2, 2019, National NTEU learned that the agency issued guidance to employees on the restoration of “use or lose” leave. Pursuant to this guidance, the agency has notified bargaining unit employees that their forfeited “use or lose” annual leave would not be restored unless the employee could demonstrate that the leave was both “scheduled and approved” by a manager prior to November 24, 2018. The guidance also states that “use or lose” leave donated to the Leave Sharing program but not processed prior to the lapse in appropriations would not be restored.

This guidance was not negotiated with NTEU. Thus, it constitutes a unilateral change to conditions of employment of bargaining unit employees and an unfair labor practice under 5 U.S.C. § 7116(a)(1), (5) and (8). It also violates Article 47, Sections 1 and 2 of the 2019 National Agreement, which requires all changes to conditions of employment of bargaining unit employees to be negotiated by the national parties before they are implemented. The agency’s issuance of this guidance also violates Article 54 (Duration and Termination), Section 2C of the National Agreement, which states:

*2C. If either party wishes to propose a change in the working conditions established pursuant to a continuing mid-term agreement or continuing practice, it will use the applicable procedures of Article 47 to provide notice and bargain to the extent required by law.*

Moreover, the requirement that “use or lose” leave be approved by a manager is contrary to the parties’ long-standing practices, under which employees scheduled leave by verbal request, via email, or simply by calendaring their leave on an Outlook calendar or some other shared calendar, among other practices. Thus, the agency’s determination also violates Article 54 (Duration and Termination), Section 2B of the National Agreement, which states:

*2B. All practices not in conflict with this Agreement or law and regulation will continue during the duration of this Agreement, subject to subsection 2C below.*

The agency’s guidance is also inconsistent with government-wide regulations, e.g. 5 U.S.C. § 6304(d)(1) and 5 CFR § 630.308(a), as well as the applicable OPM guidance, e.g. CPM 2019-02 and CPM 2019-06.

Additionally, the agency’s determination violates Article 31 (Leave Sharing Program), Section D1, under which employees are entitled to donate “use or lose” leave to inure to the benefit of the entire bargaining unit:



*If an employee has use or lose annual leave at the end of the year and would like to donate it to the Leave Bank, the employee must complete Form 9058 and submit it to the Leave Bank Coordinator. Contact information for the Coordinators will be available on the ERC website. Use or lose annual leave donations do not constitute a Leave Bank membership donation, unless the use or lose donation is donated during an official open season period.*

As a remedy for the foregoing violations, NTEU requests that the IRS:

- (i) immediately cease and desist from violating the parties' past practice; Article 47, Section 1 and 2; Article 54, Section 2B; and Article 31, Section D1 of the 2019 National Agreement; 5 U.S.C. §7116(a)(1) and (5); 5 U.S.C. §6304(d)(1); 5 CFR §630.308(a); and the applicable OPM guidance, e.g. CPM 2019-02 and CPM 2019-06;
- (ii) make whole any and all bargaining-unit employees who forfeited "use or lose" annual leave because of the lapse in appropriations and who had, prior to November 24, 2018, scheduled annual leave for pay period 26;
- (iii) make whole any and all bargaining-unit employees who forfeited "use or lose" annual leave scheduled for December 24, 2018 but forfeited because the lapse in appropriations prevented employees from rescheduling or cancelling their scheduled December 24, 2018 leave after the date was declared a holiday;
- (iv) credit the Leave Sharing program for any and all bargaining-unit employee-donated "use or lose" annual leave that was not processed due to the agency's unwarranted and unjustified personnel actions;
- (v) post a notice signed by the Commissioner of the IRS that it has committed an unfair labor practice;
- (vi) pay NTEU's attorney's fees consistent with the Back Pay Act; and
- (vii) grant NTEU any other appropriate remedies to which it is entitled under the law.

NTEU's representative in this matter will be Amy Cocuzza, National Negotiator. She can be reached at 202-572-5500, ext. 7025, or via e-mail at [amy.cocuzza@nteu.org](mailto:amy.cocuzza@nteu.org).

Sincerely,



Anthony M. Reardon  
National President

cc: Julia Caldwell, Director, IRS, Workforce Relations (via e-mail)  
Amy Cocuzza, NTEU National Negotiator  
Ken Moffett, NTEU Director of Negotiations