

Per



DECISION

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

19809

FILE: B-198627

DATE: October 20, 1981

MATTER OF: Jon P. Kindice - Reconsideration - Recredit
of sick leave after break in service

DIGEST: Although Foreign Service officer of Agency for International Development suffered involuntary reduction in force in 1974 and sought Federal employment unsuccessfully until 1979, resulting break in service in excess of 3 years precludes recrediting of sick leave to his credit at time of separation in 1974. Controlling regulatory provision in section 493.3, Volume 3, Foreign Affairs Manual, applicable during entire period of employee's claim, is not arbitrary, capricious, or contrary to law, and provides no legal basis for allowance of claim. B-198627, November 7, 1980, sustained.

Mr. Jon P. Kindice requests reconsideration of our decision B-198627, November 7, 1980, which denied his claim for reinstatement of 816 hours of sick leave following a break in service of over 3 years. In view of the clear and continued validity of the controlling provisions of law applicable to Mr. Kindice's claim, we are sustaining our original determination.

The facts were presented in our prior decision and are restated below only as necessary. Mr. Kindice, a Foreign Service officer with the Agency for International Development, was reemployed on May 27, 1979, after a break in service of 4 years, 5 months, and 3 days, which followed his separation from the agency on August 24, 1974, due to a reduction in force. Mr. Kindice's claim involves the recredit of 816 hours of sick leave which were carried to his credit at the time of the August 1974 separation. Mr. Kindice contended that since his separation was involuntary and since he actively sought Government employment during the interim period from August 1974 to May 1979 when he was reemployed, he should be allowed to have the sick leave hours to his credit at the date of his separation recredited to his presently existing sick leave balance.

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Observing that the Office of Personnel Management regulation at 5 C.F.R. 630.502(b)(1) and section 493.3 of Volume 3 of the Foreign Affairs Manual precluded the recrediting of sick leave following a break in service in excess of 3 years, and citing factually similar decisions in Alice M. Thornton, B-188913, October 17, 1977, and William F. Gallo, B-180604, April 9, 1974, we denied Mr. Kindice's claim. In so doing we noted that neither our Office nor any agency in the executive branch of the Government had the authority to waive or grant exceptions to the regulations' proscription against recrediting sick leave following a break in service in excess of 3 years. Therefore, we held that, regardless of the alleged equitable circumstances surrounding Mr. Kindice's claim, this Office was without authority to order or allow that which the law does not permit.

In requesting reconsideration, Mr. Kindice asserts that his position in 1974 as a Foreign Service officer distinguishes his case from those cited in our November 7, 1980, decision, and he contends that our application of General Schedule "standards and case law to a foreign service officer is neither applicable nor fair." In two premises predicated on the involuntary nature of his separation and his acknowledged inability to find reemployment with the Federal Government for a period of 4 years, 5 months, and 3 days following his reduction in force, Mr. Kindice contends that the rules and decisions which we applied in our initial decision in his case were not applicable to his case at the time in question. We do not agree.

As we indicated in our November 7, 1980, decision, section 1151 of title 22, United States Code, the law that was in effect at the time of his separation in 1974 and reemployment in 1979, made the annual and sick leave provisions of subchapter I of chapter 63, title 5, United States Code, applicable to Foreign Service officers. Consistent with this statutory authority the Department of State issued the following regulation in section 493.3 of Volume 3, Foreign Affairs Manual, which has uniform applicability among foreign affairs agencies, including the Agency for International Development:

"493.3 Recredit of Sick Leave

Upon Reemployment

"If a former employee is reemployed in the Service with a break in service not in excess of 3 years, his sick leave account is reinstated by the employing agency for credit or charge. This applies to reemployments which occur on or after January 9, 1962, the effective date of the extension in the length of the permissible break in service from 52 calendar weeks to 3 years."

This regulation currently appears in Volume 3 of the Foreign Affairs Manual with a transmittal date of July 19, 1968. Thus, it follows that the provisions of the regulation applied to Foreign Service officers as well as other employees of the Agency for International Development, before, during, and following the time frames involved in Mr. Kindice's claim.

As a result, Mr. Kindice's contentions on appeal require a finding that the provisions of section 493.3 of Volume 3, Foreign Affairs Manual, are not legally binding and therefore not controlling of his claim. Here again, we do not agree.

Although Federal agencies must act within the authority granted to them by statute in issuing regulations, as a general rule published regulations are deemed to be within an agency's statutory authority and consistent with Congressional intent unless shown to be arbitrary or inconsistent with the statutory purpose. Burge v. Commissioner, 253 F.2d 765 (1958). The construction of a statute by those charged with its execution is to be followed unless there are compelling indications that it is wrong, especially when the Congress has not altered that administrative construction in later amendments to the statute. Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396 (1961). We do not find the regulatory provision of section 493.3 of Volume 3, Foreign Affairs Manual, arbitrary, capricious, or contrary to law. It is clear on its face, and it is clearly applicable to the circumstances

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of Mr. Kindice's claim. Thus, notwithstanding the difficult circumstances attending Mr. Kindice's separation in 1974 and his subsequent efforts to find reemployment with the Federal Government, we find no legal basis upon which he may have the sick leave hours to his credit at the date of his separation recredited to his presently existing sick leave balance.

Accordingly, the denial of Mr. Kindice's claim is sustained.

for Milton J. Rowland
Comptroller General
of the United States