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DECISION



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

FILE: B-204097

DATE: March 1, 1982

MATTER OF: James McCargar - Entitlement to Leave

DIGEST: Effective February 15, 1981, 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. Since 5 U.S.C. § 6303(a) provides that service creditable under section 8332 shall be used in determining annual leave earning category, employee's leave accrual category should be adjusted effective February 15, 1981, to credit service with Radio Free Europe. Enactment of section 2313 does not entitle employee to annual leave benefits under 5 U.S.C. 6301, *et seq.*, for period of non-Federal service with Radio Free Europe or to additional leave for periods of covered service prior to February 15, 1981.

This decision is in response to a request for an advance decision by Mr. Joseph Duffey, Chairman of the National Endowment for the Humanities (Endowment) as to the effect of section 2313 of the Foreign Service Act of 1980 on the leave entitlement of Mr. James McCargar, an employee of the Endowment who had prior service with Radio Free Europe. Since section 2313 amends 5 U.S.C. § 8332 (b) effective February 15, 1981, to allow retirement credit for service with Radio Free Europe, such service is to be credited under 5 U.S.C. § 6303 for the purpose of determining Mr. McCargar's annual leave accrual category. His annual leave account is to be adjusted only for the period subsequent to February 15, 1981.

The record shows that prior to his employment with the Endowment Mr. McCargar was employed by Radio Free Europe for a total of 6 years 1 month and 5 days, of which 3 years 2 months and 20 days represents full-time service and 2 years 10 months and 15 days represents intermittent service.

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Section 2313 of the Foreign Service Act of 1980, Public Law 96-465, October 17, 1980, 94 Stat. 2017, 2167, in part added subsection 8332(b)(11) to title 5, United States Code, to allow retirement credit for certain service with Radio Free Europe. Subject to 5 U.S.C. § 8334(c) and 5 U.S.C. § 8339(i) service in any capacity with Radio Free Europe for 130 days or its equivalent per calendar year after July 1, 1946, is creditable service for an annuity under the Civil Service Retirement Act if such service is not credited for benefits under any other retirement system established for that entity and only if the individual later becomes subject to coverage under the Civil Service Retirement Act.

Under 5 U.S.C. § 6303 the rate at which an employee accrues annual leave is dependent upon his years of service. Subsection 6303(a) provides in part as follows concerning years of service to be credited for leave accrual purposes.

"In determining years of service, an employee is entitled to credit for all service creditable under section 8332 of this title for the purpose of an annuity under subchapter III of chapter 83 of this title."

In view of the above provision, we held in 51 Comp. Gen. 301 (1971), that all service designated as creditable under 5 U.S.C. § 8332 for the purpose of an annuity under the Civil Service Retirement Act, even though not otherwise regarded as military or Government service, may be used in determining years of service for leave accrual purposes unless excluded by other provisions of law. We see no reason why such rule would not be for application to creditable service under 5 U.S.C. § 8332(b)(11) as added by section 2313 of the Foreign Service Act of 1980. Thus, as indicated in the Endowment's submission, Mr. McCargar's service with Radio Free Europe is creditable service for the purpose of determining his annual leave accrual category.

The Endowment asks whether it is required to adjust Mr. McCargar's annual leave account for each year of his 3 years' service with the Endowment since the crediting

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of service with Radio Free Europe would retroactively change his annual leave earning category from 6 to 8 hours per biweekly pay period.

Section 2403 of the Foreign Service Act of 1980, 94 Stat. 2169, provides that, except as otherwise specified, the Act shall take effect on February 15, 1981. Section 2313 does not specify another effective date. Thus, Mr. McCargar's service with Radio Free Europe was not creditable service under 5 U.S.C. § 8332 until February 15, 1981. See Federal Personnel Manual Letter 831-66, June 30, 1981, which specifies that retirement credit may be given only to those individuals employed on or after February 15, 1981. Such service similarly would not be creditable for the purpose of determining Mr. McCargar's annual leave accrual category until February 15, 1981, and he would not have been entitled to accrue annual leave at the 8-hour rate until such time. Therefore, in order to reflect his additional service credit for leave accrual purposes, the Endowment is only required to adjust Mr. McCargar's annual leave account retroactive to February 15, 1981.

In the event that the change in Mr. McCargar's annual leave accrual category results in annual leave at the end of the leave year which is in excess of his maximum permissible carryover of annual leave under 5 U.S.C. § 6304, we are asked whether there is any authority for the restoration of such leave. Any annual leave subject to forfeiture in the 1981 leave year would be for restoration only under the provisions of 5 U.S.C. § 6304(d)(1) which allows the restoration of forfeited annual leave where the leave was lost because of administrative error or where the leave was properly scheduled in advance and was not used due to exigencies of the service or sickness of the employee. We are not aware of any other statutory authority under which Mr. McCargar would be entitled to the restoration of forfeited annual leave.

In related questions we are asked whether Mr. McCargar is entitled to credit for leave for the period of his employment with Radio Free Europe and whether he would be entitled to carry over 45 days' annual leave into the next leave year

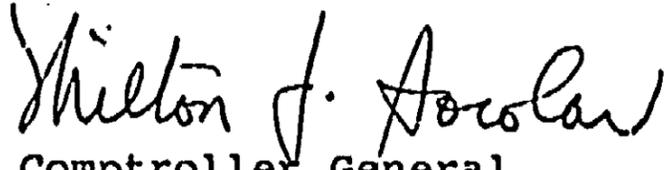
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under 5 U.S.C. § 6304(c) rather than 30 days under 5 U.S.C. § 6304(a) in view of that service.

The annual and sick leave provisions of Chapter 63 of title 5 of the United States Code apply to those employees defined at subsection 6301(2). Under 5 U.S.C. § 6304(b) certain Federal employees who are stationed overseas are entitled to a maximum permissible carryover of 45 days' annual leave. Subsection 6304(c) preserves that higher ceiling for certain employees who thereafter become subject to the 30-day limitation of subsection 6304(a).

Section 2313 of the Foreign Service Act of 1980 does not change the non-Federal character of service with Radio Free Europe except for the limited purpose of allowing retirement credit under 5 U.S.C. § 8332, and consequently for crediting such service for leave accrual purposes. For that reason and because it is effective February 15, 1981, section 2313 does not bring Mr. McCargar within the definition of employee at 5 U.S.C. § 6301 for the purpose of retroactively entitling him to annual or sick leave benefits for the period that he was employed by Radio Free Europe. Thus, Mr. McCargar's overseas service with Radio Free Europe would not affect his maximum permissible carryover of annual leave which by virtue of his employment with the Endowment would be 30 days under 5 U.S.C. § 6304(a).

For the reasons indicated above, the enactment of section 2313 of the Foreign Service Act of 1980 affects Mr. McCargar's leave entitlement only insofar as the crediting of his service with Radio Free Europe under 5 U.S.C. § 6303(a) places him in a higher leave earning category on or after February 15, 1981.

for 
Comptroller General
of the United States