

DECISION

118472
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540

FILE: B-205972

DATE: May 25, 1982

MATTER OF: Rodgers D. O'Neill - Entitlement to Military
Leave Prior to Appointment

DIGEST: Because an appointment to the civil service is effective only after the appointee has accepted the appointment and actually entered on duty, an appointee who has not 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.

The Principal Deputy Assistant Secretary (Manpower and Reserve Affairs), Department of the Army, requests a decision concerning the entitlement of Mr. Rodgers D. O'Neill to military leave. The issue is whether a new appointee is entitled to military leave when he is called to active duty in the Reserves prior to his entrance on duty for the civilian position. The appointee is not entitled to military leave because the civilian appointment had not yet become effective at the time of his call to active duty.

Mr. Rodgers D. O'Neill, a civilian, was selected by the Civilian Personnel Office, Fort McCoy, Sparta, Wisconsin, for a position as an Army Reserve Technician, Fairborn, Ohio. A prerequisite for appointment to the position was membership in a U. S. Army Active Reserve unit. Accordingly, Mr. O'Neill enlisted in such a unit on June 29, 1980, and furnished a copy of the enlistment orders to Fort McCoy. The Civilian Personnel Office at Fort McCoy notified him to report for duty on July 13, 1980, but, for personal reasons, he requested a change in his reporting date to July 27, 1980.

On July 26, 1980, Mr. O'Neill was ordered to active duty for training with his Reserve unit. Prior to this, on June 26, 1980, he had signed an Appointment Affidavit, Standard Form 61 (SF 61). Both the Appointment Affidavit and the Standard Form 50, Notification of Personnel Action indicated that the effective date of the appointment was August 10, 1980. Mr. O'Neill remained on active duty until August 9, and reported for duty for the civilian position on August 10.

Section 6323 of title 5, U.S. Code, provides that an "employee," as defined in 5 U.S.C. § 2105, is entitled to leave without loss of pay for each day, not in excess of 15 days in a calendar (now fiscal, as amended by Pub. L. No. 96-431, § 1, 94 Stat. 1850) year, on which he is on active duty as a Reserve of the armed forces. By its terms, section 6323 applies only to a person who is an "employee" as defined in 5 U.S.C. § 2105. Therefore, for Mr. O'Neill to be found eligible for military leave it must be determined that he was an "employee" during the time that he was on active duty as a Reserve of the armed forces.

Section 2105 of title 5 contains a three-part definition of "employee." An "employee" is an individual who is: (1) appointed in the civil service by an individual belonging to any of six specified categories, (2) engaged in the performance of a Federal function, and (3) subject to the supervision of an individual belonging to one of the six specified categories. Further, it has long been the general rule that an appointment is effective only after the appointee has accepted the appointment and actually entered on duty. 54 Comp. Gen. 1028, 1030 (1975) and cases cited. The appointee may signify acceptance by verbal affirmation, taking the oath of office, assumption of the duties of the position, or by some other overt act. 45 Comp. Gen. 660 (1966).

The record indicates that Mr. O'Neill signed the SF 61, Appointment Affidavit, on June 26, 1980. That form contains, among other things, an oath of office. There is no indication, however, whether Mr. O'Neill actually took the oath on June 26, or whether the oath was taken on August 10, the day he entered on duty, as contemplated by the Federal Personnel Manual Supplement 296-31, subchapter 51-5, which requires the SF 61 to be executed at the time of entrance on duty. Regardless of when he took the oath, however, it is clear from the record that Mr. O'Neill did not enter on duty until August 10. His appointment, therefore, cannot be considered to have been effective until then. In the absence of an effective appointment, it cannot be said that Mr. O'Neill was an "employee," as defined in 5 U.S.C. § 2105, at any time prior to his actual entrance on duty on August 10.

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Accordingly, Mr. O'Neil is not entitled to military leave for any period of active duty in the Reserves prior to August 10, 1980.

Milton J. Aocolaw
Comptroller General
of the United States