

**DECISION**

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

**FILE:** B-208908

**DATE:** July 13, 1983

**MATTER OF:** Estelle C. Maldonado - Home Leave - Tour  
Renewal Agreement Travel - Overseas  
Employment - Place of Actual Residence

- DIGEST:**
1. Employee of Department of Agriculture's Food and Nutrition Service was recruited from her place of permanent residence in the continental United States for assignment in Puerto Rico. Thus, she is eligible to accrue the 45 days of annual leave authorized by 5 U.S.C. § 6304(b)(1) for individuals recruited or transferred from the United States or its territories or possessions for employment outside the area of recruitment or from which transferred.
  2. Employee who qualifies for maximum annual leave accumulation of 45 days under 5 U.S.C. § 6304(b)(1), and has completed a basic period of 24 months continuous service abroad is entitled to accrue home leave under 5 U.S.C. § 6305(a) on the basis of her continuous service. Although rate at which employee earned home leave was subject to agency interpretation of implementing regulations at 5 C.F.R. § 630.604, agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted.
  3. Employee recruited from her place of actual residence in the continental United States for assignment in Puerto Rico and who meets all of the eligibility requirements under 5 U.S.C. § 5728(a) is entitled to tour renewal agreement

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travel. An agency cannot defeat an employee's travel entitlement under section 5728(a) by refusing to negotiate a renewal agreement where the particular position could have been filled locally because payment of renewal agreement travel expenses to an employee who meets all of the eligibility requirements is mandatory rather than discretionary with the employing agency.

4. Agency policy which purports to deny 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements.

In this decision, we hold that Ms. Estelle C. Maldonado, an employee of the Department of Agriculture's Food and Nutrition Service, is entitled to accumulate 45 days of annual leave under 5 U.S.C. § 6304(b) and to accrue home leave under 5 U.S.C. § 6305(a). Moreover, Ms. Maldonado is entitled to renewal agreement travel expenses under 5 U.S.C. § 5728(a) covering a round trip by her and her family between her official duty station in San Juan, Puerto Rico, and her place of actual residence in the continental (conterminous) United States, even though she was not required to execute the agency's 2-year overseas employment agreement when first assigned to Puerto Rico.

We also find improper the agency's policy that differentiates between "rotational assignments" and "permanent assignments" in the recruitment of employees from positions in the continental (conterminous) United States for placement in positions located in Puerto Rico.

BACKGROUND

Ms. Maldonado was born, raised, educated, married, and raised her family in New York, New York. In 1961 she commenced her employment with the United States Department of Agriculture (USDA or agency) in New York where she worked until October 1, 1973, when she was transferred to Hyattsville, Maryland, in a reduction in force action. Just 7 months later, she became aware of her agency's decision to open a field office in San Juan, Puerto Rico. She expressed an interest in reassignment and was selected for assignment to the position of Food Program Specialist in the San Juan, Puerto Rico, field office.

On May 24, 1974, Ms. Maldonado signed a transportation agreement incident to her transfer to Puerto Rico by which she agreed to remain in the employ of the Federal Government for a period of 12 months in return for the agency's payment of her transportation and travel expenses.

Effective July 7, 1974, Ms. Maldonado transferred to Puerto Rico. At that time, because her family had never joined her at the Hyattsville, Maryland, duty station, but had remained at the family's actual residence in New York, New York, Ms. Maldonado was authorized to ship household goods from both her actual residence in New York and her dwelling place at the Hyattsville duty station.

In 1978, after 4 years of service in Puerto Rico, Ms. Maldonado became aware of the fact that some employees assigned to duty in Puerto Rico were accruing and taking home leave. In 1979, Ms. Maldonado filed a claim for home leave and 45-day annual leave accrual with her agency. Her agency denied her claim on the basis of the agency's policy as set forth in its personnel manual that home leave was permitted only to those employees on "two-year rotational assignments" to Puerto Rico. Subsequently, on September 1, 1981, Ms. Maldonado presented her claim to this Office.

THE AGENCY'S POLICY

Numerous agency documents contained in the administrative record indicate that only employees on "rotational assignments" in Puerto Rico are eligible for

home leave. For example, a letter dated March 27, 1979, from the Personnel Officer of the agency's Mid-Atlantic Regional Office, informed Ms. Maldonado that home leave may be granted to an employee during a period of service abroad when it is contemplated that he or she will return immediately or upon completion of an assignment, but, "service based on a permanent position in the Commonwealth of Puerto Rico is not considered service abroad." Similarly, a letter dated July 16, 1979, from the Acting Director of Personnel for the Department of Agriculture to the Director of Personnel for the Food and Nutrition Service, confirms the agency's policy that home leave is granted only to employees on "rotational assignments." This letter further explains that where employees are recruited in the United States and sent to Puerto Rico for 2-year assignments, and where these employees agree at the end of the 2-year assignment to return to Puerto Rico for another 2-year assignment, home leave is granted.

In further developing Ms. Maldonado's claim our Claims Group presented a series of specific questions to the agency concerning Ms. Maldonado's assignment in Puerto Rico. Pertinent extracts from the agency's formal response--including the question presented by the Claims Group as underscored followed by the agency's response--are presented below:

"3. What type of positions are filled under rotational assignments?

"These should be the positions which duties require an employee to return to the United States or rotate between areas. The Food and Nutrition Service has at least two other employees in our Puerto Rico field office who were recruited from the United States. None of the positions they occupy require them to return to the United States or rotate. They are all on permanent assignments. Therefore, we did not enter into a rotational assignment agreement with these employees. The positions could have been filled locally.

"6. Does Ms. Maldonado have an entitlement to transportation expenses if she ever decides to return to the United States?

"Ms. Maldonado would not be entitled to transportation expenses if she were to return to the United States because an agreement was not signed and there was no time limit set for her appointment. Section 5728(a) of FPM Supplement 990-1 says that the agency shall pay the expenses of round trip travel of an employee from his post of duty outside the continental [sic] United States to the place of his actual residence 'after he has satisfactorily completed an agreed period of service outside the continental [sic] United States and is returning to his actual place of residence to take leave before serving another tour of duty... under a new written agreement...'  
\* \* \* There were no agreements signed in Ms. Maldonado's case. If Ms. Maldonado later on applies and is selected for another position which requires relocation, then entitlement to transportation expenses will be considered at that time."

Under the policy outlined above the agency allows home leave and return transportation to the United States to be granted only to those employees serving abroad on 2-year rotational assignments and does not allow such benefits to employees serving on permanent assignments in Puerto Rico.

In view of the apparent confusion that exists in the agency as to employees' rights on transfers to positions outside the continental United States we will discuss in this decision three basic statutory provisions: (1) 45 days' annual leave accumulation, (2) accrual and granting of home leave, and (3) travel and transportation.

#### STATUTORY ENTITLEMENTS

##### I. 45 DAYS' ANNUAL LEAVE ACCUMULATION

Section 6304 of title 5, United States Code, permits Ms. Maldonado to accumulate 45 days of leave if it is determined that she has an actual place of residence in the United States, its territories or possessions other than Puerto Rico. Specifically, subsection (b) (1) of the statute provides for the accumulation of 45 days annual leave to:

"(1) Individuals directly recruited or transferred by the Government of the United States from the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment or from which transferred."

As a result, an employee's entitlement to 45 days' annual leave accumulation is contingent upon the agency's independent determination as to actual place of residence. In Ms. Maldonado's case, the record shows that she was recruited from the continental (conterminous) United States--wherein New York was her actual place of residence--for assignment in Puerto Rico in May 1974. There is no evidence that she changed her permanent residence to any point in Puerto Rico that would void coverage under the statute, and accordingly, we know of no legal basis for precluding her accumulation of the additional amount of leave provided by 5 U.S.C. § 6304(b)(1). Compare 48 Comp. Gen. 437 (1968).

## II. HOME LEAVE

Essentially, both the accrual and the granting of home leave are provided for under 5 U.S.C. § 6305(a) and the regulations promulgated by OPM in 5 C.F.R. §§ 630.601-607. Those regulations provide for the accrual of home leave in appropriate amounts for employees who are assigned to overseas posts at which home leave may be earned. However, an employee's accrual of home leave must be distinguished from the agency's discretionary authority to grant home leave. An agency may grant home leave in combination with other leaves of absence in accordance with established agency policy. 5 C.F.R. § 630.606(b). Thus, this Office has consistently held that the determination as to when and in what amount home leave will be granted is a matter for administrative determination. See for example 37 Comp. Gen. 848 (1958); 35 Comp. Gen. 101 (1955).

Section 6305(a) of title 5, United States Code, provides that:

"(a) After 24 months of continuous service outside the United States, an employee may be granted leave of absence, under regulations of the President, at a rate not to exceed 1 week for each 4 months of that service without regard to other

leave provided by this subchapter. Leave so granted--

"(1) is for use in the United States, or if the employee's place of residence is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico. \* \* \*"

The OPM regulations provide under section 630.602 of title 5, Code of Federal Regulations, that an employee "who meets the requirements of section 6304(b) of title 5, United States Code, for the accumulation of a maximum of 45 days of annual leave earns and may be granted home leave in accordance with section 6305(a) of that title and this subpart." An agency, however, may grant home leave only "when it is contemplated that he will return to service abroad immediately or on completion of an assignment in the United States." 5 C.F.R. § 630.606(c)(2). Earning rates are set out under section 630.604 of the regulations.

The agency maintains that section 630.604(a)(1) allows home leave to be granted at a 15-day earning rate only to those employees who are working abroad on rotational assignments. We do not disagree with that conclusion. However, we do not concur with the agency's assessment that failure to qualify for the 15-day home leave earning rate carries with it the extinction of home leave accrual at the lesser earning rates specified in the regulations. Ms. Maldonado had the right under 5 U.S.C. § 6305(a), incident to her continuous overseas employment after May 1974, to accrue home leave under the earning provisions of 5 C.F.R. § 630.604.

As indicated above, however, an agency has discretion as to whether to allow home leave. Moreover it is not completion of an assignment but rather contemplation of another period of duty abroad that is required for authorized home leave. Lamoyne J. DeLille, 56 Comp. Gen. 824 (1977); see also Paul Peter Woronecki, B-192199, January 31, 1979.

In Ms. Maldonado's case it is obvious that her continued service abroad in Puerto Rico was required from and after May 1974. As a result, although the granting of home leave and the rate authorized is

basically for each agency's determination, the refusal to consider such a request from an employee entitled to accrue home leave based on lack of a 2-year rotational assignment was legally in error.

### III. OVERSEAS TOUR RETURN TRAVEL RIGHTS, INCLUDING RENEWAL AGREEMENT TRAVEL

It is important to understand that home leave and return travel from areas outside the United States, including return for separation, and tour renewal agreement travel are independent entitlements that are often provided coincidentally to a qualifying employee returning to the continental United States--but these entitlements do not depend one upon the other. Thus, reimbursement for the expenses of travel under the authority of 5 U.S.C. § 5722, 5724(d) and 5728 are not necessarily dependent upon the granting of home leave under 5 U.S.C. § 6305.

Travel and transportation expenses incident to a transfer outside the United States are governed by 5 U.S.C. § 5724(d), and paragraph 2-1.5 of the FTR which require an agreement for a minimum 1-year of Government service. In case of a violation of the agreement the employee is indebted for the expenses. If the agreed service period is satisfied and the employee is still stationed outside the continental United States he is entitled to return travel to the United States upon separation for whatever reason, personal or otherwise. Thus, the 1-year agreement with the agency signed by Ms. Maldonado entitled her to return travel to place of residence in the United States upon separation.

Travel and transportation expenses incident to home leave--like those same round-trip travel expenses for employees taking vacation leave in connection with tour renewal agreements--are provided under the following authority in 5 U.S.C. § 5728:

"(a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the

post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty."

These provisions are intended to provide expenses of round-trip travel and transportation for civilian Government employees and their families between tours of duty overseas for the purpose of taking leave. 49 Comp. Gen. 596, (1970), and 37 Comp. Gen. 848 supra; see also Dick D. Hendricks, B-205137, May 18, 1982, citing B-131459, May 6, 1957.

When Ms. Maldonado was recruited for assignment to Puerto Rico she was not required to execute the agency's 2-year overseas employment agreement. Although the agency states that some employees assigned to Puerto Rico were required to sign overseas employment agreements for tours of 24 months, other employees, including Ms. Maldonado, executed only a standard form service agreement by which they agreed to a 12-month Government service requirement. As indicated in the factual presentation of Ms. Maldonado's case, the agency characterized her assignment in Puerto Rico as a permanent transfer and determined she was ineligible for home leave and tour renewal travel. The agency also reported that it did not enter into rotational assignment agreements (overseas employment agreements) with employees such as Ms. Maldonado because her position was permanent and could have been filled locally.

Fulfilling the 12-month Government service agreement that Ms. Maldonado signed incident to her recruitment for assignment to Puerto Rico did not satisfy the agency's 2-year initial service completion requirement for renewal agreement travel. The employee's obligation under this agreement is limited to remaining in the Government service for 12 months after the transfer, regardless of whether the duty is within or outside the conterminous United States. Meeting the obligation entitles the employee to retain travel and transportation expenses paid in connection with her assignment or transfer to the overseas post under

subparagraph 2-1.5a(1)(b) of the FTR. On the other hand, entitlement to renewal agreement travel under 5 U.S.C. § 5728(a) requires an initial agreed period of completed service outside the continental United States and a new written agreement to serve another overseas tour of duty. See subparagraph 2-1.5h(1)(a) of the FTR.

However, the agency's failure to accord Ms. Maldonado the opportunity to execute an overseas tour renewal agreement does not foreclose her entitlement to tour renewal travel. An employee who is transferred from her place of actual residence in the conterminous United States for assignment in Puerto Rico, and who meets all of the eligibility requirements under 5 U.S.C. § 5728 is entitled to renewal agreement travel. In holding that an agency cannot defeat an employee's travel entitlement under section 5728 by refusing to negotiate a renewal agreement where the particular position could be filled locally, we have recognized that renewal agreement travel is not merely a matter of privilege. As stated in 5 U.S.C. § 5728, " \* \* \* an agency shall pay \* \* \* the expenses of round-trip travel \* \* \*" when the conditions of entitlement are satisfied. The term "shall pay" is mandatory rather than discretionary. Thus, in our decision 37 Comp. Gen. 848 (1958), we concluded that a "policy which purports to deny otherwise proper rights, as to home leave, by retaining the employee on its rolls at an overseas installation, granting him leave, and refusing to let him enter into another employment agreement solely because the position, if vacant, could have been filled locally at time of the leave may not be given effect so as to defeat the right to home leave." To hold otherwise would be, we stated, "tantamount to authorizing a circumvention of the statute."

More recently in the Hendricks case, cited above in regard to the legislative history of 5 U.S.C. § 5728, we specifically recognized that an employee's entitlement to renewal agreement travel is not defeated by the fact that he may have served in an overseas area without a written agreement, if he has served at such post for the period normally required of other employees of the agency serving in the same area.

Accordingly, since Ms. Maldonado served the ordinary period overseas expected of Department of Agriculture employees assigned to Puerto Rico and her place of residence at time of transfer to Puerto Rico

was in the United States, she met the essential requirements for entitlement to renewal agreement travel expenses.

#### IV. PLACE OF ACTUAL RESIDENCE

As discussed extensively with regard to employees assigned to duty in Puerto Rico in our decision Rafael F. Arroyo, B-197205, May 16, 1980, reconsidered February 16, 1982, the designation of an employee's place of actual residence is an administrative responsibility which must be made on the basis of all the facts in each individual case. 45 Comp. Gen. 136 (1965); 39 id. 337 (1959). Ordinarily our Office will not question any reasonable determination made by the agency of the employee's actual residence unless plainly erroneous or inconsistent with the law or regulations. See generally 35 Comp. Gen. 244 (1955).

The record before us permits no other finding than that Ms. Maldonado's place of actual residence was within the continental United States at the time of her assignment to Puerto Rico in 1974. The agency exceeded its authority by in effect attempting to arbitrarily redesignate her actual residence designation to Puerto Rico to coincide with her assignment to Puerto Rico in May of 1974.

#### ROTATIONAL VS. PERMANENT ASSIGNMENTS

The agency's policy of denying overseas employment rights to employees depending on whether an assignment is "rotational" or "permanent" and because a position in Puerto Rico could have been filled locally is unsupported by the eligibility provisions of the entitlement statutes.

As we have noted, Ms. Maldonado's entitlement to accumulate 45 days of annual leave and accrue home leave is derived from specific statutory entitlements, as implemented by OPM regulations promulgated pursuant to specific delegations of authority under those statutes. These authorities may not be waived, modified, or otherwise substantively changed to effect an agency's policy predilections. Similarly, Ms. Maldonado's right to an overseas employment agreement and to negotiate a tour renewal travel agreement is founded in the clear provisions of 5 U.S.C. § 5724 and § 5728, as implemented pursuant to statutory delegation in the General Services Administration regulations.

CONCLUSION

In accordance with our analysis of the statutory entitlements discussed above we conclude that as a matter of fact Ms. Maldonado was recruited from the continental United States for assignment outside the continental United States in Puerto Rico. At the time of this personnel action in 1974, Ms. Maldonado's place of actual residence was within the continental United States. It follows that as a matter of law, having met all of the eligibility requirements under 5 U.S.C. § 6304(b)(1), Ms. Maldonado was entitled to earn and accrue 45 days of annual leave, home leave accrual under 5 U.S.C. § 6305(a); and tour renewal agreement travel under 5 U.S.C. § 5728.

In accordance with our decision here, the agency should take action to effectuate Ms. Maldonado's overseas transfer entitlements, and to review its policy regarding overseas transfer assignments generally.

*Larry R. Van Cleave*  
for Comptroller General  
of the United States