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**DECISION**



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

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**FILE:** B-212738

**DATE:** February 14, 1984

**MATTER OF:** Daniel F. Cejka - Accrual of Annual Leave -  
Temporary Disability Retired List

**DIGEST:**

1. A servicemember received a Veterans Readjustment Appointment (5 C.F.R. Part 307), as a civilian employee during the time his name was on the Temporary Disability Retired List (TDRL) (10 U.S.C. §§ 1202 and 1205) and was credited with his military service for annual leave accrual purposes (5 U.S.C. § 6303). Under those provisions retired service-members may only receive such credit for leave purposes in limited circumstances. Since "temporary retirement" is "retirement," and since the member's disability does not meet the criteria stated in 5 U.S.C. § 6303(a)(A)(i) or (ii), nor does his service time qualify under 5 U.S.C. § 6303(a)(B) or (C), so long as he remains in a TDRL status, none of his service time may be credited for annual leave accrual purposes.
  
2. A servicemember who received a Veterans Readjustment Appointment to a civilian position during the time his name was on the Temporary Disability Retired List, was not entitled to credit his military service time for annual leave accrual under 5 U.S.C. § 6303. On question as to whether impediment to crediting such service is removed upon subsequent removal of his name from that list, upon removal, a member is either retired for permanent disability, separated from the service with severance pay, or returned to active duty for full duty, or for retirement for length of service. Only the condition of separation with severance

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pay would permit such crediting, unless as a retired member, one or more of the conditions in 5 U.S.C. § 6303(a)(A), (B), or (C) are met.

3. A servicemember who is a civilian employee while his name is on the Temporary Disability Retired List and not entitled to credit his military service for annual leave accrual under 5 U.S.C. § 6303 during that time, is only entitled to such credit effective as of the date of removal of his name from the list, if he is placed in a non-retirement status. This is so, because the basis for crediting annual leave at one of the rates specified in 5 U.S.C. § 6303(a)(1)-(3) is predicated on the completion of creditable years of service at the close of a biweekly pay period, with the applicable annual leave rate for "each full biweekly pay period" credited at the beginning of the next pay period.
4. The leave account of a civilian employee who has been erroneously credited with annual leave at a rate to which he is not entitled, must be adjusted to correct the error, immediately upon determination that an error was committed. If, on adjustment, the employee has sufficient leave credits to cover the adjustment, no overpayment of pay to which waiver under 5 U.S.C. § 5584 would apply, has occurred. If, on adjustment, he has insufficient leave credits to cover the adjustment, the resulting negative leave balance represents pay received to which he is not entitled, and, thus, is subject to possible waiver. See cases cited.

This decision is in response to a request from a Disbursing Officer, Marine Corps Finance Center, on several questions concerning the proper rate at which annual leave may accrue under the provisions of 5 U.S.C. § 6303(a) to Daniel F. Cejka, as a civilian employee of the Finance Center.

#### BACKGROUND

Mr. Cejka, while serving on active duty in the Marine Corps in the grade of staff sergeant (E-6), suffered a service-connected disability and was transferred to the Temporary Disability Retired List, effective August 20, 1979. At that time, he had performed 7 years, 5 months and 19 days of active duty. On October 13, 1981, he received a Veterans Readjustment Appointment under the provisions of 5 C.F.R. Part 307, for civilian employment at the Marine Corps Finance Center. At his appointment, he was given credit for his active duty time and began to accrue annual leave at the rate of 6 hours a pay period.

The propriety of the administrative action crediting Mr. Cejka with his military service time has now been questioned. The submission points out that the provisions of 5 U.S.C. § 6303(a)(A), (B) and (C), limit the circumstances under which a retired servicemember may receive credit for active military service. As a result, it is suggested that Mr. Cejka has been receiving annual leave at the incorrect rate.

The agency has proposed changing his service computation date, and, thus, reducing Mr. Cejka's rate of leave accrual from 6 hours, to 4 hours, as well as reducing his accrued leave balance by the amount of the leave erroneously credited. It hesitates doing so since it is uncertain whether Mr. Cejka's status on the Temporary Disability Retired List is to be considered retirement under 5 U.S.C. § 6303 as that term is defined in 5 U.S.C. § 3501, due to the nature of the limited status and time that an individual may remain on that list.

Based on the foregoing, five questions are asked. The first three questions are:

1. Is a member on the Temporary Disability Retired List a "retired member of a uniformed service" under 5 U.S.C. § 6303 so as to preclude the crediting of prior active military service for annual leave purposes?
2. If the answer to 1, is in the negative, does the removal of a member's name from the Temporary Disability Retired List and placement on the Permanent Disability Retired List cause the prohibition against crediting prior active military service under 5 U.S.C. § 6303 to operate?
3. If the answer to 2, is in the affirmative, is the operative date the date the member is placed on the Temporary Disability Retired List or the date he is permanently retired for disability?

#### DECISION

The Temporary Disability Retired List (10 U.S.C. §§ 1202 and 1205), was established for the purpose of authorizing a limited retirement status for members of the Armed Forces who become unfit to perform military duty because of physical disability, but where such disability is not determined to be of a permanent nature, with the maximum period of retention on that list limited to 5 years. (10 U.S.C. § 1210(h)). Other than situations involving immediate transfers to the permanent disability retired list (10 U.S.C. § 1210(b), (c) and (d)), or separations from the service with severance pay (10 U.S.C. § 1210(e)), members whose names are removed from that list are returned to the active list either for the purpose of resuming active duty or to be retired for length of service under other provisions of law. See 47 Comp. Gen. 141 (1967), and 50 id. 677 (1971).

The law governing accrual of annual leave for civilian employment is contained in 5 U.S.C. § 6303. While active military service is creditable as years of service for leave

accrual purposes, 5 U.S.C. § 6303(a)(A) provides, in part, that an employee who is a "retired member of a uniformed service," as defined in 5 U.S.C. § 3501, is entitled to be credited with all his active military service, but only if his retirement was for disability resulting from injury or disease received in line of duty as a direct result of armed conflict, or from an instrumentality of war incurred in line of duty during a period of war. If a servicemember's retirement was not for those reasons, subsection 6303(a)(B) provides that he only may be credited with that portion of his military service which was performed during war or in a campaign or expedition for which a campaign badge has been authorized.

For the purpose of 5 U.S.C. § 6303, the phrase "retired member of a uniformed service" is defined in 5 U.S.C. § 3501(a)(2) to mean:

"\* \* \* a member \* \* \* who is entitled, under statute, to retired, retirement, or retainer pay on account of his service as such a member."

While the above-quoted language of 5 U.S.C. § 3501 was introduced in Public Law 89-554, September 6, 1966, 80 Stat. 378, 428, as part of the codification of Title 5, United States Code, it was derived from section 101 of Public Law 88-448, August 19, 1964, 78 Stat. 484, 5 U.S.C. § 3101 (1964). In that latter provision, a member was retired if his retirement was identified as being "under any provision of law." In view of the fact that section 7 of Public Law 89-554, 80 Stat. 631, provides that the legislative purpose of the codification of title 5 was to restate, "without substantive change" the laws replaced, it is our view that the term "under statute" as used in 5 U.S.C. § 3501(a)(2) is to be given the same meaning as the phrase "under any provision of law."

In 31 Comp. Gen. 213 (1951), we considered, in part, the nature of a servicemember's status when he is transferred to the Temporary Disability Retired List from the active list. We ruled therein that, notwithstanding the fact that the presence of his name on that list did not make his retirement permanent, since the placement of his name on that list removes his name from the active list, "temporary

retirement" is "retirement." See also Captain John B. Turpit, USMCR Retired, B-206133, February 1, 1983, in which we similarly construed the language contained in 10 U.S.C. § 687(b)(4) limiting entitlement to readjustment pay.

Based on the foregoing, it is our view that for the purpose of 5 U.S.C. § 6303, an individual whose name is on the Temporary Disability Retired List is a retired member within the meaning of 5 U.S.C. § 3501(a)(2). Therefore, so long as his name is carried on that list, he is precluded from receiving credit for his military service for annual leave accrual purposes unless the cause of his disability meets the criteria stated in 5 U.S.C. § 6303(a)(A)(i) or (ii), or such service qualified under 5 U.S.C. § 6303(a)(B) or (C). Since Mr. Cejka's disability did not meet any of these criteria, his active military service may not be credited for annual leave purposes. Therefore, the first question is answered yes and the second and third questions require no answer.

The last two questions asked are:

4. If the answer to 1, is in the affirmative, does the subsequent removal of the member's name from the Temporary Disability Retired List remove the impediment to crediting active military service under 5 U.S.C. § 6303?
5. If the answer to 4, is in the affirmative, is the impediment removed effective with removal from the Temporary Disability Retired List or retroactively effective to the appointment as a civilian employee?

As previously observed, upon the removal of a servicemember's name from the Temporary Disability Retired List, he is either retired for permanent disability, separated from the service with severance pay, or returned to the active list for the purpose of resuming full-time active duty or to be retired for length of service. Thus, in the facts of the present case, only one condition following removal of Mr. Cejka's name from the Temporary Disability Retired List would permit him to credit his military service

for annual leave accrual purposes as a civilian employee. That would be separation from the service with severance pay. Question 4 is answered accordingly.

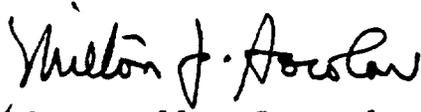
As to the question of whether removal of his name from the Temporary Disability Retired List would remove the impediment of crediting military service time effective the date of removal or retroactively to the date of his appointment to his civilian position, it may only be credited prospectively from the date of removal of his name from that list. Under the provisions of 5 U.S.C. § 6303, the basis for crediting annual leave at one of the rates specified in subsections (a)(1)-(3), is predicated on the employee's accumulation of the specified number of years of creditable service. The rate to be applied to, "each full biweekly pay period," is determined at the beginning of each upcoming biweekly pay period. Thus, until an employee has acquired sufficient years of creditable service to qualify for annual leave accrual under subsections 6303(a)(2) or (3), either by passage of time as a civilian employee, or lump-sum credit for other Federal service under some other provision of law, or a combination thereof, his rate of annual leave accrual is limited to the rate specified in subsection 6303(a)(1).

In Mr. Cejka's case, during any biweekly period of Federal employment while he is in a military retired status, either temporary or permanent, he may not be credited with his military service time. Since his civilian employment began on October 13, 1981, he is presently only entitled to accumulate annual leave at the rate of 4 hours per biweekly pay period, which condition would continue until his nonmilitary creditable service equals 3 years, or he becomes entitled to credit his military service time (separation with severance pay), whichever occurs first. Therefore, since he has only been entitled to accumulate leave at the rate of 4 hours per biweekly pay period, all annual leave credited to his account since October 13, 1981, in excess of that rate (2 hours per biweekly pay period), is to be subtracted from his leave balance.

While not addressed in the submission, since the matter of improper accumulation of annual leave apparently occurred solely due to administrative error, the issue of possible waiver should be considered. We have held that under the

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provisions of 5 U.S.C. § 5584, where an employee's leave account must be adjusted to correct a previous error and the employee has sufficient leave to his credit to cover the adjustment, there is no overpayment of pay which may be considered for waiver. B-176020, August 4, 1972. Where, however, at adjustment of his leave balance, the employee has insufficient leave to his credit to cover the adjustment, then to the extent that such leave reduction produces a negative leave balance, he has received pay to which he is not entitled. Therefore, only that leave which is in excess of his leave balance at the time of adjustment is subject to possible waiver. John P. Mitchell, B-180010.12, March 8, 1979.

*for*   
Comptroller General  
of the United States