

DECISION

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

FILE: B-207676

DATE: Dec. 21, 1982

MATTER OF: Perry L. Peterson

DIGEST:

Upon being advised that his agency would not waive his obligation to repay his indebtedness for home leave, employee of the International Communication Agency who had applied for an August 31, 1980 separation date deferred his retirement which resulted in a decrease in his monthly annuity. Foreign Service Grievance Board subsequently held that the employee would have retired on August 31, 1980, but for the "administrative error" in failing to waive repayment for home leave. Under the circumstances, the date of separation for retirement may be made retroactively effective as of August 31, 1980, and the employee would be entitled to recomputation of his annuity.

The Deputy Assistant Secretary for Personnel, Department of State, has requested a decision as to whether the Department may implement a determination by the Foreign Service Grievance Board (Grievance Board) that the annuity of Mr. Perry L. Peterson, a retired Foreign Service Information Officer with the International Communication Agency, be recomputed on the basis of a date earlier than that on which he actually retired. In view of the Grievance Board's findings, we hold that a retroactive retirement date may be established.

The record shows that Mr. Peterson who had been stationed in New Delhi, India, was medically evacuated to Washington, D.C., in October 1979. In view of the fact that there were only a few days remaining in his tour of duty in India and since the agency had already named his successor at his post of duty in India Mr. Peterson requested that he be allowed to take home leave without returning to New Delhi. This request for home leave was granted by the agency. In January 1980, while on home leave, the employee's medical clearance to serve overseas was suspended and he was officially transferred to a position in Washington, D.C., in

March 1980. Mr. Peterson states that by mid-summer 1980 he began to consider retiring due to the lack of a prospect for an overseas assignment. He further states he consulted with counselors in the Retirement Branch on August 22, 1980, and that the computations they provided on August 27, 1980, demonstrated that his annuity would be approximately \$200 a month greater if he retired by August 31, 1980, rather than in January 1981. He advises that on Thursday, August 28, 1980, he had completed all the necessary forms for his separation and made appointments for his separation physical. However, later that day as a result of reading an agency handout on Foreign Service retirement Mr. Peterson became aware that retirement at that time would result in his indebtedness for the home leave he had taken unless repayment was waived in writing by the Director, Office of Personnel Services.

The applicable regulation at Volume 3, Foreign Affairs Manual (FAM) 456.1 provides as follows:

"An employee shall be indebted for the home leave used by him when he fails to return to service abroad (1) after the period of home leave, or (2) after the completion of an assignment in the United States (or the Commonwealth of Puerto Rico or a possession of the United States, if that is the employee's home leave residence.)"

"However, a refund for such indebtedness is not required (1) when the employee has completed not less than 6 months' service in an assignment in the United States (i.e., an assignment in contemplation of the employee's return to service abroad on the completion of the assignment) following the period of home leave, or (2) when headquarters determines that the employee's failure to return was due to compelling personal reasons of a humanitarian or compassionate nature, such as may involve physical or mental health or circumstances over which the employee has no control, or (3) when headquarters determines that it is in the public interest not to return the employee to his overseas assignment."

Also, see 5 C.F.R. 630.606(e)(1980).

At the beginning of the workday on Friday August 29, 1980, Mr. Peterson, who expected to retire at the end of that workday, conferred with the Acting Director of Personnel concerning a waiver of the repayment requirement. He was advised later that day that waiver of his indebtedness for home leave had been denied. The former employee states that since he did not desire to be indebted for \$16,000, the value of the home leave he had taken, he deferred his retirement until such time that he would have clearly completed six months of duty in the United States. He subsequently retired on December 26, 1980.

On January 19, 1981, the employee filed a grievance against his agency on the basis that his retirement annuity and the potential annuity for his wife were reduced by virtue of his retirement after August 31, 1980, and that such deferral resulted from the agency's erroneous rulings on his request for waiver.

We have been informally advised that the decrease in Mr. Peterson's annuity was primarily due to his failure to retire by August 31, 1980, in order to receive certain cost-of-living adjustment benefits.

By decision dated February 9, 1982, the Grievance Board found that the deferral of Mr. Peterson's retirement date did in fact result in an appreciable reduction in his retirement annuity and his wife's potential annuity and that the employee had firmly decided to retire on August 31, 1980, and would have retired on that date had a waiver of the repayment requirement been granted. The Grievance Board determined that the agency had improperly failed to grant the employee's request for waiver under the condition set forth at 3 FAM 456.1 which provides that a refund of the indebtedness for home leave is not required when headquarters determines that the employee's failure to return overseas was due to compelling reasons of a humanitarian or compassionate nature such as may involve physical health or circumstances over which the employee had no control. The Grievance Board held that the agency improperly denied Mr. Peterson's request for waiver where the agency agreed that his medical predicament "unquestionably" satisfied the above condition for waiver. The Grievance Board found that it was by virtue of this agency error in refusing to grant waiver, based on the agency's belief that Mr. Peterson objected to waiver for reasons of health, that his

retirement date was deferred beyond August 31, 1980. The Grievance Board held that in view of this agency error Mr. Peterson was entitled to recomputation of his monthly annuity with retroactive application to the date on which he "actually began his retirement" to reflect the monthly annuity which he would have received had he retired on August 31, 1980. In view of its responsibility for administering the Foreign Service Retirement and Disability System, the Department of State was made a party to the proceedings on April 12, 1982, and the Grievance Board's findings and directive were submitted to the agency and the Department of State for action.

The Grievance Board's findings provide a proper basis for permitting the establishment of a retroactively effective separation date which would allow the recomputation of Mr. Peterson's annuity. Generally, once an employee's separation is an accomplished fact the date of separation may not be changed. We have permitted exceptions to that rule where the separation did not conform to the intention of the parties. B-159889, September 1, 1966. Also, we have permitted the change of an employee's separation date where the agency committed an administrative error by granting the employee terminal leave and advising her that she would continue to earn annual leave during that period. B-157146, July 31, 1969. In addition, we have allowed a retroactive change in the date of separation where the agency incorrectly advised employees that the circumstances of a reduction in force did not qualify them for discontinued service retirement. Matter of Ziegler and Rebo, B-199774, November 12, 1980. The above cases fall within the exceptions to the general rule against retroactive personnel actions " * * * where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation. Matter of Butler, 58 Comp. Gen. 51 (1978). See also 55 Comp. Gen. 42 (1975).

As to the first exception, the Grievance Board found that Mr. Peterson, who had filed the necessary forms for retirement, would have retired on August 31, 1980, but for the agency's failure to waive the indebtedness for home leave. The Board expressly found that the failure of the

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agency to grant a waiver under 3 FAM 456.1 constituted an "administrative error." Under the circumstances present in this case, we would not object to the establishment of a retroactive separation date to show that Mr. Peterson retired on August 31, 1980, and to the recomputation of his annuity retroactive to that retirement date.

In authorizing recomputation of Mr. Peterson's annuity retroactive to August 31, 1980, we recognize that our determination may appear to be inconsistent with the Grievance Board's determination that the annuity recomputation is to be retroactively effective not to August 31, 1980, but to the date on which Mr. Peterson "actually retired." In practical effect, the two positions result in similar entitlements. The Grievance Board's determination treats December 26, as the effective date of the former employee's retirement. We are not aware of any provision in the laws governing the Foreign Service Retirement and Disability System in effect at the time of Mr. Peterson's retirement, 22 U.S.C. 1061-1121 (1976), and 22 U.S.C. 1229 (1976), which would allow the computation of his annuity based on a retroactive date of August 31, 1980, while recognizing December 26, 1980, as the actual date of retirement. Where an employee's retirement is effected retroactive to a date prior to the time he actually ceased to be in a pay status, the employee, nonetheless, is treated as having retired on the retroactively effective date and as having served as a reemployed annuitant thereafter. As a reemployed annuitant, the retiree is entitled to the salary of the position in which he is serving plus so much of his annuity as does not exceed his basic salary at the date of his retirement. 3 FAM 125.6. Thus, Mr. Peterson would be entitled to retain the salary he received prior to December 26, 1980, and, effective that date, he would commence to receive the increased annuity.

Whilton J. Acker

for
Comptroller General
of the United States