Putnam

DECISION

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

FILE: B-214541 **DATE:** September 30, 1986

MATTER OF: Michael W. Langello - Transfer from D.C. Government to Federal Government - Transfer of Annual and Sick Leave - Rate of Basic Pay Upon Transfer

DIGEST:

1. Claimant transferred in August 1983 from District of Columbia (D.C.) government to the Government Printing Office (GPO). Under sections 422(3) and 714(c) of the D.C. Self-Government Act, Public Law 93-198, December 24, 1973, the merit system authorized to be established by the D.C. government must provide for personnel benefits, including leave and retirement benefits, for its employees equal or equivalent to those provided to them under legislation in existence at the time of enactment. Since the Act provides no authority for the D.C. government to eliminate annual and sick leave transfer rights of its employees, the annual and sick leave to the employee's credit was transferable upon employment by the Federal Government.

2. Claimant transferred from D.C. government to Federal Government in August 1983, and all of his sick leave was transferable from the D.C. government to GPO. Upon his retirement from GPO in September 1985, all of the unused sick leave to his credit at that time, including the leave transferred from the D.C. government, is includable in computing his civil service retirement annuity under 5 U.S.C § 8339(m) (1982). See 5 C.F.R. § 831.302 (1985).

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3. Employee of D.C. government was previously employed by Social Security Administration (SSA) at the GS-15, step 7, level. He transferred from D.C. government, where he held a District Schedule, DS-15, step 8, position, to GPO in August 1983. The District Schedule rates are not equivalent to the General Schedule rates and do not entitle him to rate of pay of GS-15, step 8. In employing claimant at the GS-15, step 7, level, GPO matched his highest previous salary rate under a similar pay system. This was proper and in accordance with established policy of GPO.

This decision is in response to a request by the Acting Public Printer, United States Government Printing Office (GPO), for a determination as to (1) the transferability of the annual and sick leave of Dr. Michael W. Langello, a former employee of the District of Columbia (D.C.) government, who transferred to and, until recently, was an employee of GPO, and (2) the creditability of Dr. Langello's D.C. government service for Federal civil service retirement purposes. In addition, Dr. Langello raises the issue of whether GPO acted properly in setting his rate of basic pay upon transfer.

On August 21, 1983, Dr. Langello was transferred from the position of Medical Officer with the D.C. government to the same type of position with GPO. He had been previously employed by the Social Security Administration (SSA) as a Medical Officer. At the time of his reemployment with the Federal Government, Dr. Langello had accumulated 302 hours

of annual leave 1/ and approximately 2,276 hours of sick leave. Dr. Langello retired from the Federal Service on September 30, 1985.

For the reasons hereafter stated, we hold that the annual and sick leave in Dr. Langello's leave account with the D.C. government was transferable to GPO. Therefore, his unused sick leave at retirement is to be included for civil service retirement annuity purposes. Additionally, the setting of Dr. Langello's salary by GPO, upon his reemployment with the Federal Government, was proper and in accordance with the established policy of GPO.

THE LAW AND REGULATIONS

Subchapter I, chapter 63, title 5, United States Code, 1982, governs the annual and sick leave benefits of Federal Government employees. In 5 U.S.C. § 6301(2)(B), "employee" is defined as including "an individual employed by the government of the District of Columbia." 2/ The implementing regulations, 5 C.F.R. § 630.201(b)(4) (1985), state that "'employee' means an employee to whom subchapter I of chapter 63 of title 5, United States Code, applies."

1/ We have been advised that the D.C. Government made a lump-sum payment to Dr. Langello for the annual leave in his account after his transfer to GPO. Since he has now retired and would now be entitled to a lump-sum payment for his annual leave, the issue of transferability of annual leave for him is moot and he may keep the payment received. For other employees, the issue is discussed in the text below.

2/ Section 207(c) of Pub. L. 99-335, June 6, 1986, 100 Stat. 514, 595, amends 5 U.S.C. § 6301(2)(B) to limit the definition of "employee" to individuals "first employed by the government of the District of Columbia before October 1, 1987; * * *."

Section 6308, title 5, United States Code, provides that "the annual and sick leave to the credit of an employee <u>who transfers between positions under different leave systems without a break in service shall be transferred to his credit in the employing agency on an adjusted basis under regulations prescribed by the Office of Personnel Management</u> * * *." See also 5 C.F.R. §§ 630.501(a) and 630.502(a) (1985). (Emphasis added.)

Under the provisions of the District of Columbia Self-Government and Governmental Reorganization Act (Self-Government Act), Public Law 93-198, December 24, 1973, 87 Stat. 774, 791, the District Council was required to establish an independent merit personnel system for employees of the District government. Section 422(3) of the Act provided that personnel legislation enacted by Congress would continue to be applicable to such employees until such time as the District Council provided at least equal coverage under a District government merit system. The Act stated that the merit system could provide for continued participation in all or part of the Federal civil service system. The Act also provided that nothing contained in the Act should be construed as affecting the applicability to the District government of personnel legislation relating to the District government until the District Council elected to provide equal or equivalent coverage.

The Council and Mayor approved the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Law 2-139, on March 3, 1979. Most of the provisions of the CMPA became effective on January 1, 1980. Title XII of the CMPA established a separate formal leave system for D.C. employees, CMPA § 1203, and section 3202(f) of the CMPA superseded the provisions of chapter 63, title 5, United States Code, but only for individuals hired by the D.C. government on or after January 1, 1980. Thus, individuals hired prior to January 1, 1980, were covered by both chapter 63 of title 5, United States Code, and by Title XII of the CMPA.

Thereafter, in order to unify the D.C. personnel system, the Mayor proposed that the CMPA be amended to specifically supersede various provisions of title 5, United States Code, including certain sections of chapter 63, for all D.C. government employees, irrespective of their date

of hire. The Council acted favorably on the proposal and D.C. Law 3-109 was enacted into law with an effective date of September 26, 1980.

AGENCY OPINIONS

GPO Opinion

In its opinion letter, GPO concludes that Dr. Langello should be able to retain all of his accumulated sick leave. It relies upon the definition of "employee" in 5 U.S.C. § 6301(2)(B), which includes an individual employed by the District of Columbia. Further, 5 U.S.C. § 6307(b) provides that "sick leave provided by this section which is not used by an employee, accumulates for use in succeeding years." The GPO also notes the language of 5 C.F.R. § 630.502, quoted earlier, and concludes that employees of the D.C. government are entitled to carry over their annual and sick leave balances when they transfer to the Federal Government.

In the alternative, GPO contends that, even assuming for purpose of argument that Dr. Langello ceased being an "employee" for purposes of 5 U.S.C. § 6301(2)(B) on September 26, 1980 (the effective date of D.C. Law 3-109 which made the CMPA applicable to all D.C. government employees, irrespective of date of hire), he is still entitled under 5 C.F.R. § 630.502 to have his sick leave balance as of September 26, 1980 (1,876 hours), recredited to his leave account because he was reemployed by the Federal Government within 3 years after that date.

D.C. Government Opinion

The D.C. government states that neither Congress nor the District Council intended to deprive District employees of their leave benefits upon transfer to the Federal Government. They should be treated the same as Federal employees for this purpose, albeit under a different leave system. The District argues that when Congress enacted the Self-Government Act and required the District to establish its own personnel system, it not only guaranteed to incumbent employees the retention of rights "including but not limited to * * * leave * * * [and] retirement * * * at least equal to those provided by legislation enacted by Congress * * *," but also permitted continued participation in the

Federal leave system under chapter 63 of title 5, United States Code. Title XII of the CMPA was not intended to do more, nor did it, than establish a formal leave system within the meaning of title 5, United States Code. According to the D.C. government, it was never the intent of Congress, nor of the D.C. Council, to deny any District employee the same rights enjoyed by all other individuals under the Federal civil service system.

The D.C. government also points out that employees who transfer from the Federal Government to the District government without a break in service are entitled to have their sick and annual leave transferred. 1 D.C. Code § 1-613.3(k). It contends that the assumption behind this provision is that District service is considered as "service under a different leave system" and is therefore subject to the portability provisions of 5 U.S.C. § 6308.

OPM Opinion

The Office of Personnel Management (OPM) concludes to the contrary that for individuals hired by the D.C. government on or after January 1, 1980, there is no authority to transfer annual or sick leave from the D.C. government to the Federal Government. In addition, for individuals who were employed continuously by the D.C. government since at least December 31, 1979, there is no authority to transfer annual or sick leave from the D.C. government to the Federal Government on or after September 25, 1980. However, D.C. government service continues to be creditable for civil service retirement purposes.

The OPM points out that although the D.C. leave system is similar to the Federal leave system, the two systems are separate. Annual and sick leave may be transferred between positions under different leave systems only as provided by 5 U.S.C. § 6308, which was specifically superseded by D.C. Law 3-109 for all D.C. government employees. Therefore, OPM states that D.C. Law 3-109 must be regarded as superseding OPM regulations issued under 5 U.S.C. § 6311.

The OPM therefore concludes that the inclusion of D.C. government employees in the definition of "employee" in 5 U.S.C. § 6301(2)(B) and 5 C.F.R. § 630.201(b)(4)

has no continuing effect in view of the action of the D.C. government, which lawfully excluded its employees from the Federal leave system, including the provisions for the transfer of leave.

As to Dr. Langello, OPM states that its regulations provide for recredit of sick leave to an employee separated from the Federal Government if he is reemployed in the Federal Government without a break in service of more than 3 years. Since Dr. Langello was continuously employed by the D.C. government from before January 1, 1980, through September 25, 1980, he must be regarded as having been an "employee," as defined in 5 U.S.C. § 6301(2)(B), through September 25, 1980. Thus, upon reemployment by the Federal Government within 3 years after that date, he was entitled to recredit of the sick leave to his credit on September 25, 1980.

OPINION

Transferability of Annual and Sick Leave

As previously stated, section 422(3) of Public Law 93-198 provided that legislation enacted by the Congress relating to leave, which was applicable to District employees, would continue in effect until such time as the District Council provided for coverage under a D.C. government merit system. Section 422(3) also provided, in essence, that the District government merit system shall provide for persons employed by the District government immediately preceding the effective date of the merit system, personnel benefits, including leave and retirement benefits, "all at least equal to those provided by legislation enacted by Congress, or regulation adopted pursuant thereto, and applicable to such officers and employees immediately prior to the effective date of the system * * *." (Emphasis added.)

The District of Columbia Court of Appeals in American Federation of Government Employees v. Barry, 459 A.2d 1045 (D.C. App. 1983), discussed the effect of the "at least equal to" language in the D.C. Self-Government Act on the development of a compensation system for District employees. The court concluded that the "at least equal to" language did not require the District to develop a compensation system for D.C. government employees guaranteeing

continuing equality of all benefits. Thus, it denied a 9.1 percent pay raise to D.C. government employees which would have been equal to that paid to Federal Government employees. However, the court referred to the "at least equal to" language in the appendix, 459 A.2d at 1052, and stated that:

> "* * * it is the fourth sentence of the provision that states which personnel benefits must remain at least equal to the previously applicable federal benefits after the new local law goes into effect. The examples of benefits listed in this sentence are all finite entitlements - e.g., pay, tenure and leave-and do not include any personnel process or mechanisms."

The court went on to say that only concrete entitlements, as opposed to statutory processes, were required to remain at least equal to the previously applicable Federal entitlements. And, as shown above, leave is one of the concrete entitlements.

In addition to section 422(3), above, section 714(c) of Public Law 93-198, 87 Stat. 819, provides that:

> "Unless otherwise specifically provided in this Act, nothing contained in this Act shall be construed as affecting the applicablity to the District government of personnel legislation relating to the District government until such time as the Council may otherwise elect to provide equal or equivalent coverage."

We do not dispute the fact that the Self-Government Act gave the D.C. government the authority to establish an independent merit personnel system for its employees. However, as the language in sections 422(3) and 714(c) shows, the D.C. government could not establish a new leave system that provides benefits to its employees that are less than those provided by legislation enacted by Congress. Congress had enacted legislation which entitled a D.C. government employee to transfer annual and sick leave to a Federal agency. 5 U.S.C. § 6308 (1982). Moreover, we do not believe that Congress intended to authorize the

District of Columbia to take away the leave transferability rights of D.C. government employees upon their employment with the Federal Government. As shown above, Congress, in sections 422(3) and 714(c) of the Self-Government Act, took steps to prevent the D.C. government from reducing the leave entitlements of D.C. government employees. It is therefore a fair inference that Congress certainly did not intend to allow the D.C. government to negate the provisions of 5 U.S.C. §§ 6301(2)(B) and 6308.

In any event, the D.C. government opinion letter expressly disavows any intent to deprive its employees of such rights when they transfer to Federal agencies. Since the D.C. government has provided full leave transferability to Federal employees who transfer to the D.C. government, and since the Congress has not repealed the transferability provisions of 5 U.S.C. § 6308 for D.C. government employees transferring to the Federal Government, those provisions remain in full force and effect. The purported supersession of sections 6301(2)(B) and 6308 by the District Council in enacting the CMPA (1 D.C. Code § 633.2(a)(6) (1981)) is of no effect. The District Council lacked authority to repeal the leave transferability rights of D.C. government employees upon employment or reemployment with the Federal Government.

As noted above (Footnote 2) Congress has acted in Public Law 99-335 to limit the definition of "employee" in 5 U.S.C. § 6301(2)(B) to those individuals first employed by the D.C. government before October 1, 1987. This amendment obviously has no effect upon Dr. Langello or upon any employee hired by the D.C. government before October 1, 1987.

Accordingly, the annual and sick leave in Dr. Langello's leave account with the D.C. Government was fully transferable upon his employment with GPO. 3/

3/ As stated above in footnote 1, Dr. Langello was paid by the D.C. government for his annual leave and has since retired. Hence, no further discussion of his annual leave is necessary.

Since Dr. Langello's unused sick leave was transferable from the D.C. government to GPO, the unused sick leave in his account when he retired, including the transferred leave, is properly includable as part of his total service in computing his civil service retirement annuity under the provisions of 5 U.S.C. § 8339(m) (1982) and 5 C.F.R. § 831.302 (1985).

Pay Entitlement of Dr. Langello Upon Transfer from the D.C. Government to GPO

Dr. Langello states that while he was employed by the D.C. government immediately prior to his transfer to GPO, his rate of pay was at the General Schedule, GS-15, step 8, level. He contends that his rate of pay at GPO should have been set at the GS-15, step 8, level.

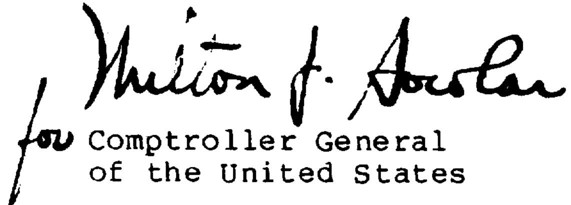
The record discloses, however, that Dr. Langello was employed by the D.C. government under the District Schedule (DS), at the DS-602-15, step 8, level, and not under the General Schedule pay system used by the Federal Government. His salary as a DS-15, step 8, employee with the District government at the time of his transfer to GPO in August 1983 was $56,301, a lower rate than the rate of GS-15, step 8.

In establishing his rate of basic pay with GPO, agency officials state that Dr. Langello was given the benefit of the higher rate between: (a) matching the DS rate of pay ($56,301) with the General Grade (GPO equivalent to GS) pay scale; or (b) matching his highest previous rate of pay under the General Schedule which he was paid as an employee with SSA at the GS-15, step 7, level ($60,689 at the time of appointment with GPO in August 1983). Since method (b) was the higher of the two methods used, Dr. Langello was appointed by GPO at the GG-15, step 7, level, at an annual salary of $60,689, an increase of $4,388 annually.

The rate of basic pay to which a Federal employee is entitled upon change of position or type of appointment is governed by regulations issued by OPM pursuant to 5 U.S.C. § 5334 (1982). The implementing regulation, 5 C.F.R. § 531.203(c)(1) (1983), sets forth the methodology for computing the maximum rate of basic pay that may be paid a reemployed employee. We have consistently interpreted OPM regulations as vesting discretionary authority in the

agency in the application of the so-called "highest previous rate rule" in establishing an employee's rate of basic pay. Marie Barna, B-194726, July 24, 1979; Clifton A. Russell, B-186554, December 28, 1976.

Here, since Dr. Langello had been employed by SSA prior to his transfer to the D.C. government, GPO selected the salary rate of $60,689 (rate at time of appointment on August 21, 1983) to match his highest previous rate while employed by SSA. This method of computing Dr. Langello's rate of basic pay was proper and in accordance with the established policy of GPO.



for Comptroller General
of the United States