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Office of the General Counsel

B-239592

August 23, 1991

Mr. Thomas N. Willess
General Counsel
Defense Investigative Service
1990 Half Street, S.W.
Washington, D.C. 20324-1700

Dear Mr. Willess:

This responds to your request for our opinion regarding apparent improper payments made pursuant to a settlement agreement between the Defense Intelligence Service (DIS) and one of its employees,^{1/} and the liability of the certifying officers who approved the payments. The payments at issue include payments for relocation expenses, annual, sick, holiday and administrative leave, and a within grade increase. For the reasons stated below, we conclude that these payments were improper.

The record shows that Mr. _____, Assistant Director of Resource Management, certified payment of the relocation expenses. Consequently, he is liable for this amount. The record does not identify the official who certified the remaining expenses. We will consider relieving that official, if appropriate, if you identify the official and submit the necessary documentation of his actions.

BACKGROUND

The Defense Investigative Service, after an administrative inquiry that documented misconduct by one of its special agents, proposed that the agent be reduced in grade and reassigned to another DIS office. The agent, with his attorney, negotiated a settlement agreement with DIS. Pursuant to that agreement, dated January 6, 1987, the agent agreed to resign from DIS effective March 20, 1987 and DIS agreed to (1) reassign the agent from a DIS office in Nashville, Tennessee to an office in Springfield, Missouri, prior to March 20, without a reduction in grade, (2) pay the associated moving and relocation expenses normally allowed by

^{1/} Based on our authority to determine the legality of expenditures of appropriated funds, this Office may determine the legality of awards agreed to be agencies in informal settlement of personnel actions. See, 64 Comp. Gen. 349, 351 (1985).

DIS and relieve the agent from the statutory requirement that he continue employment with the agency for 12 months after the move, and (3) allow the agent to continue to use accumulated sick and annual leave until his resignation. The agent then signed a 12-month service agreement although neither party anticipated that the agreement would be honored. The agent subsequently moved to Springfield. DIS reimbursed the agent \$16,723.19 in relocation costs. From the date of the agreement until his resignation, the agent used 296 hours of sick leave, 80 hours of annual leave and received 8 hours of holiday leave.

An investigation conducted by the Department of Defense's Inspector General confirmed the above facts and in addition found that although the agent never performed work for the Springfield office, he had been granted a within-grade step increase on February 1, 1987, prior to his resignation. The Inspector General concluded that payment of relocation expenses, the within-grade increase, and the grant of sick, annual, and holiday leave after January 6 were improper. We agree with the Inspector General's conclusions.

Relocation Expenses

The head of an agency can authorize or approve payment of the travel and relocation expenses of an employee transferred to another location for permanent duty. 5 U.S.C. §§ 5724(a). Payment is conditioned upon the determination by the head of the agency that the transfer is in the interest of the government and is not primarily for the convenience or benefit of the employee. 64 Comp. Gen. 258, 270 (1985). Travel, transportation, and relocation allowances may be paid only after the employee agrees in writing to remain in government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. 5 U.S.C. § 5724 (i).^{2/} If the employee violates the service agreement, the amount spent by the government is recoverable from the employee. *Id.*; B-230338, June 21, 1988, sustained on reconsideration, B-230338.2, June 2, 1989.

In this case, there is no evidence that such a determination was made. Since the employee never reported to his new duty station, it is difficult to conclude that the relocation served any legitimate government interest. The agent signed a service agreement, but never intended to, and did not in fact,

^{2/}Generally we do not consider a separation for cause to be a separation for reason beyond the employee's control. See *e.g.*, 64 Comp. Gen. 643 (1985); B-114898, July 31, 1975; 47 Comp. Gen. 503 (1968).

comply with that agreement. Accordingly, we find that DIS was without authority to reimburse the employee for travel and relocation expenses.

Annual, Holiday and Administrative Leave

Administrative authority to grant an employee annual leave immediately prior to separation from government service, when it is known in advance that the employee is to be separated, is limited to cases where the exigencies of service require such action. 54 Comp. Gen. 655, 658 (1975). There is nothing in the record which indicates that any exigencies of service required granting the agent such terminal annual leave. To the contrary, it appears under the circumstances that the sole purpose for granting the leave was to induce the agent to voluntarily resign and refrain from contesting the proposed personnel action.

Because a federal holiday occurred during the period DIS granted the agent terminal annual leave, DIS credited the agent with 8 hours of holiday leave. Section 5551(a) of title 5, U.S. Code, provides that the period of leave used for calculating a lump sum payment shall not be extended due to any holiday occurring after the employee's separation. Since a lump sum payment should have been paid to the agent in lieu of granting him terminal annual leave, and under a lump-sum payment, holiday pay is not allowed, the agent was not entitled to receive the 8 hours of holiday pay. Cf. 61 Comp. Gen. 363 (1982).

The agent was also granted 40 hours of administratively excused leave, apparently in connection with his relocation. Administrative leave excuses federal employees without loss of pay or charge to annual or sick leave accounts during periods in which they perform no official duties. See generally, 64 Comp. Gen. 835, 843-44 (1985). Each agency has the responsibility for determining situations in which administrative leave will be granted. However, agency discretion is not unlimited. It must be exercised within the bounds of statutes and regulations and the guidance provided in our decisions. Id. We have specifically allowed the granting of administrative leave in connection with permanent change of station relocations. See, e.g., B-180693, May 23, 1974. In this case, however, since the payment of the agent's relocation expenses was not in accordance with statute, we

think the agency's grant of administrative leave in furtherance of the relocation was improper as well.^{3/}

Sick Leave

The record shows that the agent used his entire balance of sick leave prior to resigning on March 20. According to the Inspector General's report, the agent stated that he was not sick or otherwise entitled to use sick leave from the date of the settlement agreement through the effective date of his resignation. The circumstances under which an agency may grant sick leave to an employee are set forth in 5 C.F.R. § 630.401, and in general involve incapacitation due to health-related concerns. See B-207444, Oct. 20, 1982. The record submitted to us does not document any such circumstances here. Accordingly, the agency's grant of sick leave to the agent was improper.

Within-Grade Increase

Similarly, the within-grade increase the agent received on February 1 was improper. The authority for granting such increases is contained in 5 U.S.C. § 5335 and its implementing regulations, 5 C.F.R. Part 531, Subpart D. In accordance with these provisions, employees must complete certain waiting periods for advancement between steps. In this case, but for the improper granting of sick leave and terminal annual leave, the agent would not have been eligible for the pay increase. We therefore find that he was not entitled to additional income received as a result of the within-grade increase.

Certifying Officer Liability

We recognize that public policy favors the amicable settlement of disputes, and agreements accomplishing this result will be disregarded only for the strongest of reasons. 62 Comp. Gen. 239, 244 (1985). Here, for instance, pursuant to the Back Pay Act, 5 U.S.C. § 5596 (1982), the DIS could have

^{3/} Our Office recently addressed, in similar circumstances, the propriety of a determination by DIS to grant an employee 1 year of administrative leave pursuant to a settlement agreement. In a response to a request for advice by the Merit Systems Protection Board, we stated "The award of administrative leave proposed here would not further any purpose or function of the Department of Defense. The agency would be expending funds without receiving any benefit in kind....Further, the fact that the administrative leave was granted in settlement of a personnel claim does not alter the result." B-236124, Jan. 2, 1990.

granted compensation to the agent if it had determined that the employee was affected by an unjustified or unwarranted personnel action. See 5 C.F.R. § 550.804(c).^{4/} Such a determination would have allowed the DJS to award back pay for the purpose of making the employee financially whole. In this case, DIS did not make such a determination; nor does the record evidence any DIS violations of law or regulation or commission of an unjustified or unwarranted personnel action when it proposed the reduction in grade. Since DIS authorized the leave and payment of relocation expenses in violation of applicable statutes, the government is entitled to reimbursement. See 67 Comp. Gen. 457, 464 (1988). The record shows that the agent was paid \$16,723.19 in relocation expenses, \$660.00 in administrative leave, \$5,061.52 in sick leave, and \$274.72 in holiday pay, for a total of \$22,719.43.^{5/} Since the agent would have been due a lump-sum payment for his annual leave but for the agreement, he is entitled to retain the \$1,332.00 he received in the form of salary as that amount is equivalent to what his lump sum payment would have been.

The overpayments to the agent constitute a debt owed to the United States, and the agent is liable for the \$22,719.43 he erroneously received. 31 U.S.C. § 3711 (a)(1); 4 C.F.R. 102.1(a). DIS is required to pursue collection unless the agency compromises the claim pursuant to 31 U.S.C. § 3711 (a)(1), as implemented by The Federal Claims Collection Standards (FCCS), 4 C.F.R. §§ 101-105. DIS states, however, that it does not wish to recover from the agent because it believes there is a substantial likelihood of litigation. DIS has informed us that it believes that Mr. [redacted], DIS Assistant Director of Resource Management, is liable as a certifying officer for the improper payments. A certifying official who signs a voucher is responsible for the existence and correctness of the facts cited in the certificate, voucher, or supporting papers and the legality of the proposed payment, and is liable for the amount of any illegal, improper or incorrect payment resulting from any false, inaccurate, or misleading certificate made by him, as well as for any payment prohibited by law or which did not represent a legal

^{4/} An unjustified or unwarranted personnel action is defined in the regulations as an act of commission or omission that an appropriate authority subsequently determines to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation or mandatory personnel policy established by an agency or through a collective bargaining agreement. 5 C.F.R. § 550.803.

^{5/} These amounts include the increased value of the leave due to the improper within-grade increase.

obligation. 31 U.S.C. § 3528 (a). A certifying official who authorizes a payment that is improper, incorrect, or illegal, is jointly and severally liable with the person or persons who benefited from the payment to repay to the United States the amount of the loss incurred as a result of the illegal, improper, or incorrect payment. 67 Comp. Gen. 457 (1988).

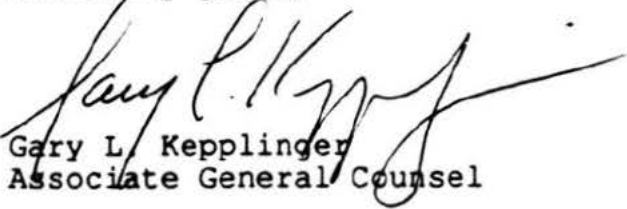
The record shows that Mr. [redacted] signed, as approving official, the form authorizing the payment of relocation expenses. Consequently, he is liable for this erroneous payment. The record does not disclose the identity of the official who certified the remainder of the improper payments, the administrative leave, sick leave, holiday pay and within-grade increase.

This Office has authority under 31 U.S.C. § 3528 (b) (1) (A) to relieve a certifying official from liability when we find that the certification was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information. According to information provided us by DIS, Mr. [redacted] was the supervisor of Mr. [redacted], the DIS employee who negotiated the agreement. We think it unlikely that Mr. [redacted] was not aware of the terms of the settlement agreement when he authorized the payment of the relocation expenses. Furthermore, the record suggests that Mr. [redacted] was aware of the impropriety of the settlement; it notes that the DIS General Counsel, earlier, had advised against a similar proposed settlement in which Mr. [redacted] was involved. Memorandum from General Counsel to Director, DIS, January 31, 1990. Accordingly, on the basis of the present record, we must deny Mr. [redacted] relief from liability for the payment of \$16,723.19 in relocation expenses. We note, however, that Mr. [redacted]'s indebtedness would be reduced by any amount recovered from the agent and, pursuant to 31 U.S.C. § 3711(d), by any amount not recovered if the claim is compromised.

We will consider the issue of the certifying official's liability for the remainder of the improper payments, and relief, if appropriate, if DIS submits a request identifying the official who certified those payments, accompanied by the necessary documentation. We are suspending the statute of

limitations with regard to this matter to permit DIS the opportunity to provide us with this information. See 31 U.S.C. § 3526(g); B-235044, B-234947, B-234958, Mar. 20, 1990.

Sincerely yours,



Gary L. Kepplinger
Associate General Counsel