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DECISION

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

FILE: B-194241 DATE: October 9, 1979

AG 000026

MATTER OF: James L. Davis, Jr. - Social Security Administration Administrative Law Judge - Within-Grade Salary Increase - Credit for Annual Leave

[Request for]
DIGEST:

1. Employees cannot receive credit for accrued annual leave on his service computation date upon separation and reappointment by different agency since period covered by lump-sum payment is not counted as civilian Federal service.

2. Employee alleges he had reemployment rights upon separation from agency in reduction in force. He is not entitled to service credit or pay adjustment based on violation of reemployment rights. Civil Service Regulations provide that employee may appeal alleged violation of reemployment rights to Civil Service Commission and there is no evidence of determination by Commission upon which to base entitlement to service credit or pay adjustment.

This decision is in response to a claim by James L. Davis, Jr., Administrative Law Judge (ALJ), Department of Health, Education, and Welfare (HEW), Social Security Administration (SSA), for a within-grade salary increase and credit for annual leave on his service computation date.

The claimant alleges he is entitled to backpay because he was not given the benefit of the highest previous rate rule when temporary GS-14 Black Lung Hearing Examiners, who were given permanent GS-13 ALJ positions, continued in the Black Lung program. He also believes that he should have been advanced to step 4 in GS-14 earlier than he was because he should have been given service credit for 5-1/2 weeks, the period covered by a lump-sum payment for annual leave in a prior GS-14 position with the Selective Service System when he was separated in a reduction-in-force action effective June 30, 1973. In addition, he alleges he should have been employed by HEW prior to the date he was actually employed because he had reemployment rights. No action will be taken by us in connection with that part of the

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claim based on the highest previous rate rule since HEW has advised that it will make certain pay adjustments as explained below. The remaining parts of the claim are disallowed for the reasons set forth after the explanation of the HEW action.

Our Office has previously considered similar claims of SSA Administrative Law Judges in our decision of June 11, 1979, Milton Morvitz, et al., B-192562. That decision concerned ALJs who had served as temporary GS-14 Black Lung Hearing Examiners. They had been given permanent GS-13 positions pursuant to Pub. L. No. 92-603 but continued to hear Black Lung cases and were later appointed to new GS-14 Administrative Law Judge positions as authorized by Pub. L. No. 94-202. We held that the ALJs were not entitled to retroactive pay based on application of the highest previous rate rule because its use is discretionary and the rate in GS-13 of each employee was properly set in accordance with the agency's regulations. We also held that the ALJs should be given credit for the time spent in GS-14 Black Lung Hearing Examiner positions toward within-grade increases in their GS-14 ALJ temporary positions. The basis for this holding was that although the employees had been given permanent GS-13 positions, they were immediately placed on leave without pay in GS-13 and reassigned to the new GS-14 positions and such action did not start new waiting periods.

The record indicates that ALJ Davis received a within-grade increase on October 15, 1972, from GS-14, step 2, to GS-14, step 3, while employed as a General Attorney, GS-905-14, with the Selective Service System, Atlanta, Georgia. He was separated from his Selective Service position by a reduction in force effective June 30, 1973. He received severance pay and a lump-sum payment for 174 hours of accrued annual leave and 8 hours for a holiday. ALJ Davis was then employed on March 4, 1974, by the Office of Hearings and Appeals, HEW, under an excepted appointment, not to exceed December 31, 1974, as a GS-935-14, step 3, Administrative Law Judge (temporary), under the authority of Pub. L. No. 93-192, 87 Stat. 746 (1973). His appointment was extended several times by subsequent legislation.

ALJ Davis received a within-grade increase to GS-14, step 4, on June 23, 1974, and a subsequent increase to GS-14, step 5, effective June 20, 1976. It was later determined by HEW that this increase was in error because it was felt that the employees who had been given permanent GS-13 positions and temporary GS-14 ALJ positions received an equivalent increase in pay under the provisions of 5 U.S.C. § 5335(a)(A) (1976), and were required to begin new waiting periods. Thus, ALJ Davis' within-grade increase was cancelled on September 3, 1976.

As stated above, our decision in Milton Morvitz, et al. held that employees who received permanent GS-13 positions but continued to hear cases in the Black Lung program as temporary GS-14 ALJs were in fact reassigned and, therefore, entitled to credit for all the time spent in grade GS-14 toward an in-grade raise. Based on this decision, HEW has advised that ALJ Davis will now be entitled to a within-grade increase effective June 20, 1976, and action will be taken to make the necessary correction in his record to show that fact. The HEW also advises that any subsequent records that may be affected by the change will also be corrected, and ALJ Davis will receive the payments due him as a result of these corrections. It should be pointed out, however, that HEW waived the portion of ALJ Davis' payment from June 20 to September 3, 1976, under the provisions of 5 U.S.C. § 5584 (1976). That provision provides that the Comptroller General may waive a claim, the collection of which would be against equity and good conscience and not in the best interests of the United States. The authority under that statute has been delegated to the head of an agency in some circumstances. 4 C.F.R. § 91.4(b) (1978). Thus, ALJ Davis would not be entitled to payment at the rate for GS-14, step 5, for the period covering the waiver since he has previously been paid at that rate.

ALJ Davis also claims credit for his paid annual leave on his service computation date. Such entitlement, if allowed, would entitle him to within-grade increases prior to the dates they were actually made. The authority for lump-sum payments of annual leave is contained in 5 U.S.C. § 5551 (Supp. III, 1973) which provides, in pertinent part, as follows:

> "(a) An employee * * * who is separated from the service * * * is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave. The lump-sum payment is considered pay for taxation purposes only." (Emphasis added.)

We have long held that the employee's right to a lump-sum payment of annual leave accrues to the employee at the time of separation from service and that the period covered by a lump-sum leave payment is not counted as civilian Federal service. John L. Swigert, Jr., B-191713, May 22, 1978; 26 Comp. Gen. 102, 106 (1946); 24 Comp. Gen. 526 (1945); FPM Supp. 990-2, Book 550, subchapter S2-3a. Note also that the plain language of the statute states that the lump-sum payment is considered pay for taxation purposes only. Therefore, the period covered by the lump-sum payment for unused annual leave may not be considered service to advance the granting of a step increase to ALJ Davis.

Finally, ALJ Davis also alleges that he should have been employed at an earlier date by HEW. However, HEW states that it is not aware of any obligation to employ him earlier nor is there any evidence of arbitrary action with respect to his employment. Appointing officers are given great discretion in filling vacancies in the competitive service. 5 C.F.R. § 330.101 (1978). Further, Civil Service Commission (now Office of Personnel Management) Regulations provide that an employee may appeal an alleged violation of reemployment rights to it within a reasonable time. See 5 C.F.R. §§ 330.202, 330.203. Thus, ALJ Davis could have protested to the Civil Service Commission any alleged violation of reemployment rights at the time of his employment by HEW in 1974. Since there is no evidence

of any determination by the Commission that he should have been employed at an earlier date by HEW, there is no basis for granting any service credit during ALJ Davis' break in service or pay adjustment.

Milton J. Socolar

for Comptroller General
of the United States