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**DECISION**



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

**FILE:** B-196063

**DATE:** April 18, 1980

**MATTER OF:** Vincent T. Oliver - [Repayment of lump-sum leave payment *and* Restoration to duty]

- DIGEST:**
1. Employee who was restored to duty following wrongful separation must have lump-sum leave payment deducted from backpay award. 57 Comp. Gen. 464 (1978). There is no authority to permit employee to elect option of retaining lump-sum payment and cancelling annual leave.
  2. Employee was restored to duty following wrongful separation. Lump-sum leave payment was deducted from backpay and he was recredited with annual leave. Erroneous lump-sum payment is subject to waiver under 5 U.S.C. § 5584, but waiver is not appropriate in this case since there was no net indebtedness. See 57 Comp. Gen. 554 (1978); 56 *id.* 587 (1977). Prior cases to contrary, 55 Comp. Gen. 48 (1975) and B-175061, March 27, 1972, will no longer be followed.

Mr. Vincent T. Oliver, an employee of the Department of Transportation (DOT), has filed a claim requesting that his lump-sum payment for annual leave of nearly \$4,000 not be deducted from his backpay award upon restoration to his position following an erroneous separation. The issues presented for our decision are: (1) whether an employee upon restoration to his position may choose between retaining the lump-sum payment or receiving credit for the leave; and (2) whether collection of the lump-sum payment may be waived under 5 U.S.C. § 5584.

Mr. Oliver was removed from his position on July 12, 1976, and, in connection with that action, he received a lump-sum payment of \$3,965.25 for 255 hours of annual leave. Mr. Oliver appealed his removal to the Civil Service Commission which reversed the removal action and ordered his restoration to duty. He was reinstated on March 24, 1978, and received backpay retroactive to the date of his removal, but DOT deducted from his backpay award the amount of the lump-sum leave payment and recredited him with 255 hours of annual leave. Mr. Oliver

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argues that by recrediting 255 hours of leave representing the lump-sum payment and by crediting him with 286 hours of leave accrued during his improper removal, he will be forced to take long absences from duty in order to avoid eventual forfeiture of annual leave. Therefore, he requests waiver of repayment of the lump-sum amount and cancellation of the 255 hours of annual leave.

Under the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1976), when an appropriate authority corrects an unjustified or unwarranted personnel action, the employee's pay and leave are recomputed as if the personnel action had not occurred. See 5 C.F.R. Part 550, Subpart H (1978). Since Mr. Oliver's separation was determined to be erroneous, it is regarded as if it had never occurred and he is not entitled to retain the lump-sum payment he received for annual leave under 5 U.S.C. § 5551 (1976). Thus, the payment he received in 1976 is a proper set-off against the backpay award. Ernest E. Sargent, 57 Comp. Gen. 464 (1978). See also 32 Comp. Gen. 162 (1952); 32 id. 22 (1952); and 28 id. 333 (1948). Also, we know of no basis on which Mr. Oliver could be permitted to elect the option of retaining the lump-sum payment and cancelling the annual leave.

In prior decisions involving civilian employees in similar fact situations, we have held that a lump-sum leave payment could not be considered for waiver under 5 U.S.C. § 5584 since the payment was proper when made and the orders retroactively restoring the employee to his position did not render the lump-sum payment erroneous. Bennie L. Moore, 55 Comp. Gen. 48 (1975); and B-175061, March 27, 1972. By way of contrast, however, in similar cases involving members of the uniformed services, we have held that lump-sum payments of leave were rendered improper upon restoration to duty and, hence, were subject to consideration for waiver. Reserve Members, 56 Comp. Gen. 587, 590, 592 (1977), and 57 id. 554, 558-559. Upon further review we believe this same rule should be applied to cases involving civilian employees. Therefore, we now conclude that, when actions removing employees are held to be improper in accordance with the provisions of 5 U.S.C. § 5596, the lump-sum payments made in connection with such removals may no longer be considered "proper when made" but must be considered to be erroneous payments. Accordingly, our prior decisions, 55 Comp. Gen. 48, supra, and B-175061, supra,

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which held that consideration for waiver is not appropriate, will no longer be followed. Generally, waiver should be approved in such cases only to the extent necessary to avoid a net indebtedness.

In the present case, we note that even with a deduction for the lump-sum leave payment, Mr. Oliver received a backpay award in excess of \$29,000 so that there was no net indebtedness. In addition, under the provisions of 5 U.S.C. § 5596(b)(1)(B)(i), Mr. Oliver's restored annual leave in excess of the maximum leave accumulation was credited to a separate leave account. Under these circumstances, we conclude that waiver of collection of the lump-sum payment to Mr. Oliver would not be appropriate.

Accordingly, we hold that the agency acted properly in deducting the lump-sum payment from Mr. Oliver's backpay award and recrediting him with 255 hours of annual leave.



For the Comptroller General  
of the United States