

**DECISION**

19612 *Roney*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-199806

DATE: September 29, 1981

MATTER OF: Alberta H. Nutsch - ASCS County Committee  
Employee's Entitlement to Highest Previous  
Rate and Transfer of Leave

**DIGEST:**

1. Agricultural Stabilization and Conservation Service (ASCS) county committee employee (a nonfederal position) was separated in reduction in force during 1975. Upon appointment with the Forest Service in 1978 salary was erroneously computed by using highest previous rate earned with the county committee. Employee appeals correction of error. Appeal must be denied since permissive language of 5 U.S.C. § 5334(e) vests in agency discretion as to use of highest previous rate. Agency regulations state that rate may only be used where there is no break in service.
2. ASCS county committee employee who was separated during 1975 and subsequently received an appointment with the Forest Service in 1978 after a 3-year break in service seeks to have her unused sick leave recredited. She was properly denied credit for unused sick leave. Under 5 U.S.C. § 6312 county committee employee may have leave balances transferred under 5 U.S.C. § 6308. That section authorizes credit for unused leave balances only where employee transfers between positions under different leave systems without a break in service.

Mrs. Alberta H. Nutsch appeals our Claims Group Settlement Z-2818830, May 2, 1980, which denied her claim for credit of unused sick leave and her claim to have her salary set pursuant to the highest previous rate rule set forth at section 5334(e) of title 5, United States Code (1976).

Mrs. Nutsch was employed as a county committee employee (a nonfederal position) in several positions with the Agricultural Stabilization and Conservation Service (ASCS),

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United States Department of Agriculture (USDA), between October 26, 1964, and June 27, 1975, when she was separated due to a reduction in force. Her grade at that time was County Office (CO)-4, step 6, which earned a rate of pay that was then equivalent to a GS-4, step 6.

Almost 3 years later, on March 12, 1978, Mrs. Nutsch received an appointment with the Forest Service, USDA, in a position classified at GS-3.

The Forest Service, on the basis of the highest previous rate she had earned with the county committee pursuant to section 5334(e), set her rate at GS-3, step 10. Incident to this appointment Mrs. Nutsch was also credited with the amount of unused sick leave which she had to her credit when she was separated from the ASCS county committee position in 1975.

Mrs. Nutsch subsequently transferred to a GS-4 position with the ASCS on July 16, 1978. Her salary was set by the ASCS on the basis of the highest previous rate she had earned with the Forest Service, GS-3, step 10, and her rate was established at GS 4, step 8. Subsequently, the ASCS promoted her to GS-5 on July 29, 1979.

In processing the promotion action, the ASCS audited Mrs. Nutsch's records and determined that upon appointment in 1978 with the Forest Service, she was not entitled to have her initial salary computed by using her highest previous rate earned in the county committee position during 1975, and that she was not entitled to the unused sick leave that remained to her credit when terminated from the county committee in 1975. Mrs. Nutsch was advised that because there was a 3-year break in service between her employment with the county committee and the Forest Service, she was not entitled to have her salary computed under section 5334(e) or to be recredited with unused sick leave. Accordingly, upon her promotion to GS-5, the Forest Service fixed her rate of pay at step 1. Mrs. Nutsch appealed to our Claims Group the action of the Forest Service in denying her the highest previous rate and recredit of unused sick leave. The Claims Group upheld the agency's action, but waived the gross amount of Mrs. Nutsch's indebtedness. She has now appealed the Claims Group denial of her claim.

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We first turn to the question of Mrs. Nutsch's entitlement to have her salary computed on the basis of the highest previous rate that she earned with the county committee in 1975. Section 5334(e) provides:

"An employee of a county committee established pursuant to section 590h(b) of title 16 may upon appointment to a position under the Department of Agriculture, subject to this subchapter, have his initial rate of basic pay fixed at the minimum rate of the appropriate grade, or at any step of such grade that does not exceed the highest previous rate of basic pay received by him during service with such county committee."

By use of the word "may", section 5334(e) leaves it to the discretion of the USDA whether it will apply the rule. This is also the case with application of the highest previous rate rule contained in 5 C.F.R. 531.203(c) (1980), to employees with prior Federal service. See Charles V. Liebscher, B-194893, May 20, 1980.

The Department of Agriculture has issued regulations to implement the provisions of section 5334(e). Paragraph 2-3.c of the U.S. Department of Agriculture Personnel Manual, chapter 531 states:

"ASC county employees moving to USDA positions without a break in service may have their rate of basic pay set at:

\* \* \* \* \*

"(2) any step of the grade that does not exceed the highest rate of basic pay received as a county employee. \* \* \*."  
(Emphasis added.)

See also ASCS Personnel Handbook 3-PM (Rev. 2), para. 50 A which provides: "ASCS county service can only be used to determine initial rate of pay for a USDA appointment when appointment to USDA is without a break in service from county appointment."

Thus, the USDA has administratively determined that the highest previous rate rule will not be applied where there has been a break in service between employment with the county committee and appointment to a position with the USDA. This is entirely within its discretion. See Charles V. Liebscher, supra. In that decision we upheld an agency policy not to apply the highest previous rate rule where the employee had been separated for more than 5 years. We stated that:

"Each agency is permitted to formulate its own policy regarding the rule. B-186554, December 28, 1976. Where an agency has not relinquished its discretion through adoption of a mandatory policy or administrative regulation, the agency is under no obligation to grant an employee the benefit of the rule."

Therefore, since the USDA clearly could impose restrictions on the application of the highest previous rate rule, we find that the Forest Service could not use that rule to establish Mrs. Nutsch's salary upon her initial appointment, after a 3-year break in service. Her salary properly should have been set at GS 3, step 1. Her subsequent appointment to a GS 4 position with the ASCS should have been to step 1. Accordingly, we sustain the settlement of the Claims Division with regard to Mrs. Nutsch's entitlement to have her salary set pursuant to section 5334(e).

We now turn to her entitlement upon appointment to the Forest Service on March 12, 1978, to recredit of the unused sick leave balance to her credit in 1975 when her county service was terminated.

Mrs. Nutsch relies on the provisions of section 6312 of title 5, United States Code (1976). The pertinent portion of that section provides:

"\* \* \* The provisions of section 6308 of this title for transfer of annual or sick leave between leave systems shall apply to the leave system established for [employees of a county committee established pursuant to 16 U.S.C. § 590h(b)]."

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Section 6308 provides:

"The annual and sick leave to the credit of an employee who transfers between positions under different leave systems without a break in service shall be transferred to his credit in the employing agency \* \* \*." (Emphasis added.)

It can be seen that section 6308 only authorizes the transfer of annual and sick leave where the employee transfers without a break in service. Since Mrs. Nutsch had a break in service of about 3 years she is not entitled to a recredit of her sick leave balance to her credit upon termination of her county service in 1975.

For the reasons set forth above, we must uphold the settlement of our Claims Group and deny Mrs. Nutsch's claims.



Acting Comptroller General  
of the United States