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DECISION



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

FILE: B-200945

DATE: August 24, 1981

MATTER OF: John J. Daly, Jr.--Home leave and renewal agreement travel

DIGEST: Employee took annual leave in U.S. after his request for home leave had been denied on basis of agency's refusal to extend his overseas tour of duty and fact that reassignment to the U.S. was imminent. Granting of home leave is within agency discretion. Under circumstances refusal to grant home leave was proper and home leave may not be substituted for annual leave taken even though agency subsequently agreed to employee's request to extend overseas tour of duty for additional year. Circumstances of employee's travel did not meet conditions for renewal agreement travel.

This decision request from the Assistant Attorney General for Administration, Department of Justice, involves the question of whether the extension of an employee's overseas tour of duty after the employee had been denied home leave may serve as a basis to substitute home leave for annual leave he took in the United States after the request for home leave had been denied. We are also asked whether the Department may pay renewal agreement travel expenses in connection with the annual leave taken. Since the determination to deny home leave was a proper exercise of administrative discretion retroactive substitution of home leave and recredit of annual leave taken is not authorized. Also, the travel expenses incurred in connection with the annual leave taken may not be reimbursed as costs of renewal agreement travel.

Mr. John J. Daly, an employee of the Immigration and Naturalization Services (INS), was assigned to duty in San Juan, Puerto Rico, from February 1968 until November 21, 1978. At his request and with the express understanding that no further extension would be granted, Mr. Daly's tour of duty was extended until November 21, 1979. Nevertheless, in June of 1979, Mr. Daly requested a further extension of his tour of duty in Puerto Rico and at that same time asked to be granted home leave for the period from July 19 to September 7, 1979. Both requests were denied.

[Propriety of Agency Refusal to Grant Home Leave]

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In July of 1979, Mr. Daly traveled to the United States in an annual leave status, having first lodged an appeal in which he explained the personal hardships that he felt justified further extending his tour of duty. He also agreed to forego home leave in the event of an extension of his tour of duty. On November 30, 1979, the INS agreed to a final extension of Mr. Daly's tour of duty to November 21, 1980. After that extension was granted, Mr. Daly asked that the annual leave he had taken in July and August of 1979 be recredited to his annual leave account and that his absence for that period be charged against the home leave balance he had accrued while stationed in Puerto Rico. The INS refused to recredit the leave and stated:

"* * * Even though your request for reconsideration of the disapproval had not been acted upon, you elected to take annual leave from the end of July 20 to mid-August. Home leave is normally granted when an extension of overseas duty is officially approved and taken between tours of overseas duty. Since you took annual leave prior to the end of your tour and during a period when you were, in effect, scheduled to return to duty in the United States, we do not consider it appropriate to recredit your annual leave and charge the leave taken to Home Leave."

Employees who have completed a basic period of 24 months continuous service abroad accrue home leave under 5 U.S.C. 6305. As provided at 5 C.F.R. § 630.606 and reiterated in Department of Justice Order 1630.1A, a grant of home leave is at the discretion of an agency and may be made only during an employee's period of service abroad or within a reasonable period after his return from service abroad when it is contemplated that he will return to service abroad immediately or on completion of an assignment in the United States.

Although there is no express prohibition against authorizing home leave near the end of an employee's overseas tour of duty--the basis upon which Mr. Daly's initial leave request was denied--such action appears consistent with the proper exercise of administrative discretion. Home leave is granted

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to permit employees to visit their homes during extended periods of service overseas. Such a visit just before the employee is scheduled to return from overseas service would not serve the purpose for which home leave is granted. Mr. Daly does not claim that the INS' initial determination in this regard was improper but he suggests that the INS should have retroactively reversed that determination on the basis of its action extending his tour.

We have not questioned an agency's authority to grant home leave retroactively when it appears that all the facts were not known or when the law and regulations were not properly applied at the time such leave was initially denied. B-170250, October 23, 1970. However, in a case involving the grant of advance sick leave, another situation in which the grant of leave is subject to the broad discretion of the agency, we indicated that any retroactive grant of such leave should be predicated on a finding that initial denial had been unjustified and unwarranted. Margaret E. Thorpe, B-187171, June 7, 1977.

In this case the original denial of home leave was in keeping with the overall purpose for the granting of such leave and the later extension of the employee's tour of duty at his request was for his benefit. Further, denial of home leave was not based upon a lack of knowledge of the facts or on a failure to apply existing regulations correctly. Accordingly, a retroactive grant of home leave would not be appropriate.

The Assistant Attorney General has raised the question of Mr. Daly's entitlement to renewal agreement travel expenses in connection with his home leave request. Specifically, we are asked whether the travel costs Mr. Daly incurred in July and August of 1979 may be reimbursed in the event he is allowed to substitute home leave for the annual leave at that time. While substituting the leave in question is not authorized, we point out that reimbursement for the expenses of renewal agreement travel under the authority of 5 U.S.C. 5728 is not necessarily dependent upon the granting of home leave under 5 U.S.C. 6305. Under section 5728 round-trip travel expenses from a post of duty outside the continental United States to the place of actual residence are payable in the case of an employee who has completed an agreed period of service overseas and is returning to his place of actual residence prior to serving

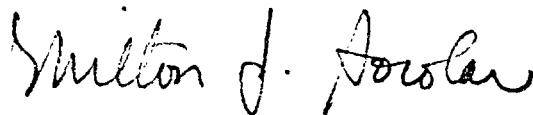
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another overseas tour of duty under a new written agreement entered into before departing from the overseas post.

In July and August of 1979 Mr. Daly did not meet the conditions for payment of travel expenses under 5 U.S.C. 5728 and the circumstances under which his tour of duty was subsequently extended do not change the fact that his travel was performed at a time when it was not contemplated that he would serve a further tour of duty overseas.

We have recognized that requiring the employee to execute an agreement to serve a further tour of duty overseas is for the protection of the Government and the failure to execute such an agreement does not defeat an employee's entitlement when it is otherwise intended that he will return to an overseas post for an additional tour of duty. See Richard W. Groff, B-186213, August 3, 1976, and cases cited therein. Where the failure to execute the necessary agreement is an administrative oversight, round-trip travel expenses may nevertheless be paid.

In Mr. Daly's case the request for a further assignment abroad had been denied on the basis of a proper administrative determination not to extend his tour. His travel was performed in the face of that decision. In the circumstances his written agreement was not called for and failure to execute it was deliberate--not merely a procedural omission. Since failure to execute the agreement cannot reasonably be characterized as an oversight, the travel expenses Mr. Daly incurred in connection with the annual leave taken in July and August of 1979 may not be paid.



Acting Comptroller General
of the United States