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

DECISION

Validity of Regulations Dealing With Leave Settlements for Public Health Service Officers

FILE: B-201706 DATE: March 17, 1981

MATTER OF: Leave Settlements - Public Health Service Commissioned Corps

DIGEST:

1. Although Federal agencies must act within the authority granted to them by statute in issuing regulations, as a general rule published regulations are deemed to be within an agency's statutory authority and consistent with Congressional intent unless shown to be arbitrary or inconsistent with the statutory purpose, since the construction of a statute by those charged with its execution is to be followed unless there are compelling indications that it is wrong, especially when the Congress has not altered that administrative construction in later amendments to the statute.

2. Although the Public Health Service (PHS) Commissioned Corps is a "uniformed service" it is not an "Armed Force," and while the legislative history of the statutes pertaining to the leave system of the PHS Commissioned Corps indicates that Congress intended to confer upon PHS officers "substantially" the same leave benefits as provided for members of the Armed Forces, many significant and obvious differences exist between those leave systems; hence, current statutes derived from the Armed Forces Leave Act of 1946 are not for application in PHS leave cases where the different statutory provisions require a different result.

3. Under a statutory proviso enacted in 1950 granting a Public Health Service (PHS) officer a final settlement for unused accrued annual leave upon his separation from active duty if "his application for (that) leave is approved by the Surgeon General," PHS has long required a PHS officer who breaches his active duty commitment to be divested of leave.

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Regulations so providing are clearly valid, since the statutory proviso plainly authorizes the Surgeon General to deny leave applications in appropriate circumstances and Congress has not modified that statutory authority. 37 U.S.C. 501(g). 58 Comp. Gen. 77 (1978) affirmed.

This action is in response to a letter dated December 30, 1980, with enclosures, from the Assistant Secretary for Personnel Administration, Department of Health and Human Services, requesting a decision on the validity of regulations which operate to divest a commissioned officer of the Public Health Service (PHS) of unused accumulated and accrued annual leave if the officer resigns prior to completing an obligated term of active duty. We have concluded that the regulations are valid.

In requesting a decision in this matter, the Assistant Secretary has included information concerning a former PHS medical officer who was divested of his leave upon separation because of his failure to complete his active duty obligation. Apparently this officer procured a civilian position with the Department of Labor and sought to have his PHS leave transferred to his new position. The divestment of his leave has given rise to a general question concerning the statutory authority of the PHS to divest commissioned officers of unused accumulated and accrued annual leave if they fail to complete their obligated terms of active duty. While the PHS strongly defends this practice, essentially, it is noted that the legislative history of the statutes pertaining to the leave system of the Commissioned Corps of the PHS shows that Congress intended to confer upon PHS officers substantially the same leave benefits as provided for personnel of the Armed Forces. It is also said that statutes relating to the leave benefits of members of the Armed Forces do not authorize a service member who resigns prior to the completion of an obligated term of active duty to be divested of his accrued leave. Because of this, a general question has arisen as to whether sufficient statutory authority exists to support the regulations requiring PHS officers to forfeit their leave if they fail to honor their active duty commitments.

Subsection 501(g) of title 37, United States Code (1976), provides in pertinent part as follows:

> "(g) An officer of the Regular Corps of the Public Health Service, or an officer of the Reserve Corps of the Public Health Service on active duty, who is credited with accumulated and accrued annual leave on the date of his separation, retirement, or release from active duty, shall, if his application for that leave is approved by the Surgeon General, be paid for that leave in a lump-sum * * *. A lump-sum payment may not be made under this subsection to an officer--
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> "(3) who is transferred to another department or agency of the United States under circumstances in which, by any other law, his leave may be transferred." (Emphasis added.)

The source of 37 U.S.C. 501(g) is to be found in the act of August 9, 1950, ch. 654, 64 Stat. 426, which authorized a final annual leave settlement for a PHS officer upon his separation from active duty "in the event his application for such leave is approved by the Surgeon General." This original legislation was reenacted and recodified as 37 U.S.C. 501(g) by Public Law 87-649, approved September 7, 1962, 76 Stat. 451, 482. The language of 37 U.S.C. 501(g) was later modified in certain respects by Public Law 94-361, approved July 14, 1976, 90 Stat. 923, 926, but the statutory proviso was left undisturbed which made a PHS officer eligible for a final annual leave settlement upon his separation from active duty only "if his application for that leave is approved by the Surgeon General."

Reportedly, since 1950, the PHS, pursuant to this statutory proviso, has specified the conditions a PHS officer must meet in order to be eligible for approval of a leave settlement upon his separation from active duty. We have previously held that a PHS officer who fulfills

all of the conditions prescribed by the statute and implementing regulations may not arbitrarily be denied a final leave settlement, and that such an officer is legally entitled either to a lump-sum leave payment or, if appropriate, to have his PHS leave balance transferred to a civil service leave account. See 38 Comp. Gen. 833 (1959); 34 Comp. Gen. 287 (1954); B-190458, January 26, 1978. However, we have also expressed the view that a PHS officer who fails to fulfill those conditions may properly be divested of his leave; specifically, in 58 Comp. Gen. 77, 79 (1978) we held that:

> "Under 37 U.S.C. 501(g) a commissioned officer of the Public Health Service may be paid a lump-sum payment for unused annual leave under certain circumstances, with the approval of the Surgeon General. It has been the practice of the Surgeon General to disapprove applications for the lump-sum payment made by officers who do not serve the entire period of duty to which they agreed. See PHS Personnel Instruction 3, dated July 13, 1976, CC 22.2, Section H, paragraph 5. Since the Congress specifically provided approval authority to the Surgeon General in connection with the payment for unused annual leave, it is our conclusion that regulations providing for a divestiture of this entitlement are within the scope of the statute."

To the same effect, see B-192285, December 15, 1978.

In preparing those decisions we recognized that generally, Federal agencies must act within the authority granted to them by statute in issuing regulations. See 56 Comp. Gen. 943, 949 (1977); 53 Comp. Gen. 547 (1974). Regulations are deemed to be within an agency's statutory authority and consistent with Congressional intent unless shown to be arbitrary or inconsistent with the statutory purpose. 58 Comp. Gen. 635, 637-638 (1979); 42 Comp. Gen. 27 (1962). In that connection, the construction of a statute by those charged with its execution is to be followed unless there are compelling indications

that it is wrong, especially when the Congress has declined to alter that administrative construction in later amendments to the statute. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). Regulations which have properly been issued by an agency under a statutory grant of authority have the force and effect of law. 43 Comp. Gen. 516, 519 (1964).

Although the history of the 1950 legislation pertaining to the leave system of the PHS Commissioned Corps does show that Congress intended to confer upon PHS officers "substantially" the same benefits as provided for members of the Armed Forces, many significant and obvious differences exist between those leave systems. See B-191053, June 16, 1978. The PHS is one of the "uniformed services," but it is not an "Armed Force." 10 U.S.C. 101(4); 37 U.S.C. 101(3) (1976). And while the leave statutes applicable to the Armed Forces may not specifically authorize a military or naval officer who resigns prior to completing his obligated term of active duty to be divested of leave, it is also to be noted that military and naval officers are not legally eligible to resign their commissions in contravention of the regulations applicable to them. See 10 U.S.C. 885(b) (1976); and also compare 37 U.S.C. 501(e) (1976). Provisions of statute derived from the Armed Forces Leave Act of 1946, now codified in 10 U.S.C. ch. 40 and 37 U.S.C. 501(a)-(f) (1976), are not for application in PHS leave cases where the different statutory provisions require a different result. 38 Comp. Gen. 833, supra, at page 835.

The statutory language of 37 U.S.C. 501(g) expressly provides that a PHS officer may be granted a final settlement for annual leave upon his separation from active duty only "if his application for that leave is approved by the Surgeon General," and it is our view that this statutory proviso plainly contemplates that the Surgeon General's approval will be withheld in appropriate circumstances. Reportedly this has been the practice for three decades, and the Congress has not altered the statutory proviso under which the regulations have been promulgated, even though the original 1950 legislation has from time to time been amended in other respects. Hence, it is our

view that the longstanding regulations which operate to divest a PHS officer of unused accrued leave if he fails to complete his active duty obligation are valid and within the scope of the statute. We therefore affirm our previous decisions concerning the issue.

Milton J. Socolar

Acting Comptroller General
of the United States