



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: James J. Serpente - Waiver of Military Leave
Erroneously Granted

File: B-229409

Date: November 22, 1988

DIGEST

An employee who had accumulated 16 days of military leave was erroneously granted 28 days of military leave over a 2-month period. His indebtedness for use of 12 days of excess military leave is subject to waiver under 5 U.S.C. § 5584 (1982), but we conclude that waiver is not appropriate under the circumstances.

DECISION

The issue presented is whether an employee who was granted excess military leave may have the resulting overpayment waived under 5 U.S.C. § 5584 (1982) when, at the time the leave was used, the employee had annual leave available for usage. We conclude that an overpayment resulting from excess military leave usage may be considered for waiver, but that waiver is not appropriate in this case.

BACKGROUND

This decision is in response to an appeal by Mr. James J. Serpente, an employee of the Norfolk Naval Shipyard (Shipyard), Portsmouth, Virginia, Department of the Navy. He appeals the settlement action by our Claims Group, Z-2879559, dated August 12, 1987, which held that annual leave or leave without pay (LWOP) should be charged for the use of excess military leave and that waiver was not appropriate.

The statutory authority for the granting of military leave is contained in 5 U.S.C. § 6323(a) (1982). As amended in 1980, that statute provides federal employees who are members of Reserve components of the armed forces with military leave at the rate of 15 days per fiscal year with a carryover of up to 15 days of unused military leave into a

043999/137426

succeeding fiscal year. Mr. Serpente used 28 days of military leave during the 1982 fiscal year when, in fact, he was entitled to use only 16 days of military leave (1 day carryover from fiscal year 1981 and 15 days for fiscal year 1982) during the year. Accordingly, there was no statutory authority for granting him the 12 additional days of military leave.

The agency later determined that Mr. Serpente should have been charged LWOP for 12 days and that he was therefore overpaid salary in the amount of \$1,695.36. Mr. Serpente requested waiver of the overpayment of pay under the provisions of 5 U.S.C. § 5584 (1982).^{1/}

Mr. Serpente states that his records substantiate that he is often called to perform active military duty and that as a result of frequent military recalls, his military leave record eventually developed errors. Mr. Serpente states that during 1982 when he used the military leave in question, he was informed by the payroll office that he had an adequate amount of military leave to cover his periods of active duty. Mr. Serpente also states that he was first notified of his negative military leave balance in June 1986, and he contends that, had he been made aware of the 12-day overpayment in a timely manner, he would have used annual leave or LWOP during his military training.

The Navy Accounting and Finance Center questions whether an overpayment of pay due to excessive use of military leave is subject to waiver when the employee had annual leave available at the time of usage.

OPINION

Under the provisions of 5 U.S.C. § 5584 (1982) and 4 C.F.R. parts 91-93 (1988), a claim of the United States against an employee arising out of an erroneous payment of pay or allowances may be waived, in whole or in part, by the Comptroller General of the United States or the head of the agency concerned.

With regard to waiver of erroneous amounts of annual leave, we have held that waiver of excess annual leave is appropriate when, as a result of a later adjustment to an employee's leave account, it is shown that the employee has taken leave in excess of that to which he was entitled, thereby creating a negative balance in his annual leave

^{1/} We note that he subsequently substituted annual leave for the 12 days of excess military leave.

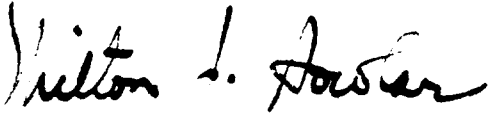
account. Otherwise, there is no overpayment which may be considered for waiver under the waiver statute since the error is susceptible to correction through reduction of the employee's positive leave balance. Franklin C. Appleby, B-183804, Nov. 14, 1975; B-176020, Aug. 4, 1972; B-166348, June 3, 1969.

However, in a decision involving indebtedness for home leave, we held that waiver would be available for use of excess or erroneously granted home leave. Lamoyne J. DeLille, 56 Comp. Gen. 824 (1977). We noted that home leave and annual leave are authorized under separate statutes; they have different requirements for accrual and accumulation; the purposes for granting each form of leave are different; and there is no authority to allow lump-sum payment for home leave. DeLille, supra. Each of those distinctions apply equally to military leave. Thus, we conclude that excess or erroneously granted military leave may be subject to waiver under 5 U.S.C. § 5584 (1982).

In determining whether waiver should be granted in this case, we point out that pay or allowances arising out of administrative errors may be waived by the Comptroller General if collection "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a). However, such authority may not be exercised if there is an indication of fraud, misrepresentation, lack of good faith, or fault on the part of the employee. There is no evidence of fraud, misrepresentation, or lack of good faith by Mr. Serpente; however, it appears that he is not without fault in the creation of the overpayment.

In determining whether the actions by an employee are reasonable under the circumstances, we take into consideration such matters as the employee's position, knowledge, experience, and length of service. See Carolyne Wertz, B-217816, Aug. 23, 1985; John R. Hanson, B-189935, Nov. 16, 1978. We note that Mr. Serpente was a supervisor in the Industrial Relations Office, Personnel Operations Division at the Shipyard, a grade GS-12 level employee with approximately 18 years of federal service. We believe that in view of his frequent usage of military leave while on active duty for training as a Commander in the Naval Reserve, he should have been familiar with the limitations on military leave. Therefore, we conclude that Mr. Serpente was at least partially at fault in not being aware that he had only 16 days of military leave for usage during the

period in fiscal year 1982 when he used 28 days of military leave. Accordingly, waiver of the overpayment of pay is denied.

for 
Comptroller General
of the United States