

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548****FILE:** B-207676**DATE:** May 7, 1984**MATTER OF:** Matter of Perry L. Peterson**DIGEST:**

Incident to implementing a Foreign Service Grievance Board decision ordering the recomputation of a retired foreign service officer's annuity the Comptroller General advised the employing office to fix a retroactively effective retirement date and treat the employee as a reemployed annuitant until the date he in fact retired. Taking the actions directed resulted in the employee's being granted sick leave in excess of the amount to his credit. Waiver of the debt for pay received during use of excess sick leave is granted under 5 U.S.C. § 5584 since the change in the retirement date made the grant of this sick leave erroneous and there is no indication that the individual was at fault in the matter.

The United States Information Agency has asked whether Mr. Perry L. Peterson, a retired Foreign Service Information Officer, formerly employed by that agency should be required to reimburse the Government for the use of 76 hours of excess sick leave during the period from September 1 to December 26, 1980.<sup>1</sup> The excess sick leave resulted from the agency's action retiring Mr. Peterson retroactively on August 31, 1980, and treating him as a reemployed annuitant for the period from September 1 to December 26, 1980, in accordance with our decision Matter of Peterson, B-207676, December 21, 1982. In that decision we considered a request by the Department of State for an opinion as to whether it could properly implement an order by the Foreign Service Grievance Board directing that Mr. Peterson's annuity be recomputed on the basis of an August 31, 1980 retirement date and that he be paid the recomputed annuity beginning on December 26, 1980, the date he "actually retired." Under the circumstances waiver of Mr. Peterson's indebtedness for

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<sup>1</sup>The matter was presented by Mr. James A. Kohler, Jr., Chief, Financial Operations Division, Office of the Comptroller, United States Information Agency.

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the 76 hours of excess sick leave used is granted under 5 U.S.C. § 5584.

Although Mr. Peterson had intended to retire on August 31, 1980, his retirement was deferred until December 26, 1980, so that he would have served 6 months after home leave which was taken earlier in the year. Had he not served for 6 months after taking home leave he would have been placed in debt for the cost of the leave unless the agency waived that requirement. Because the agency in August denied his application for waiver of the 6-month requirement, Mr. Peterson remained on active service until 6 months had been served.

On January 19, 1981, Mr. Peterson filed a grievance against the agency on the basis that his retirement annuity was reduced by virtue of the delay in his retirement that resulted from the agency's denial of his application for waiver. By decision dated February 9, 1982, the Grievance Board found that the deferral of Mr. Peterson's retirement reduced his annuity and that he would have retired on August 31, 1980, if he had been granted the waiver he had requested. The Grievance Board found that the agency had improperly denied Mr. Peterson's application for waiver and held that he was entitled to recomputation of his annuity retroactive to the date on which "he actually began his retirement" to reflect the monthly annuity which he would have received had he retired on August 31, 1980. In view of its responsibility to administer the Foreign Service Retirement and Disability System the Department of State was made a party to the proceedings by directive of the Grievance Board on April 12, 1982, and the February 9, 1982 Board decision was submitted to the agency and the Department of State for action.

The decision of the Foreign Service Grievance Board in Mr. Peterson's case was rendered pursuant to the Foreign Service Act of 1946 as amended and the regulations promulgated thereunder. See 22 C.F.R. § 909.6 (1981). Under that authority the Board's order is final subject only to judicial review. See 22 U.S.C. §§ 1037a(13) and 1037c (1976). Matter of Sales, 62 Comp. Gen. 671 (1983).

The Board's decision in Mr. Peterson's case is final. However, since decisions of the Board must be predicated

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upon the applicable law and regulations (22 U.S.C. § 1037a(1)(B) and (13)), we interpreted that decision in a manner which would implement the Board's decision while being consistent with applicable laws. In Mr. Peterson's case the Department was advised to establish a retroactive separation date to show that Mr. Peterson retired on August 31, 1980, recompute his annuity based on that retirement date, and treat him as a reemployed annuitant between August and December.

This approach was used because we were not aware of any provision in the laws governing the Foreign Service Retirement and Disability System which would have allowed the computation of his annuity based on a retroactive date of August 31, 1980, while recognizing December 26, 1980, as the actual date of retirement. We noted that Mr. Peterson would be entitled to retain the salary he received prior to December 26, 1980, and effective that date, would commence to receive the increased annuity.

At the time that decision was issued we were not aware that Mr. Peterson had used sick leave in excess of that which could be credited to him as a reemployed annuitant. The agency points out that if Mr. Peterson is treated as a reemployed annuitant commencing August 31, 1980, he begins the period of reemployment with no sick leave to his credit since his former sick leave balance will have been used in computing his annuity. Since Mr. Peterson used 112 hours of sick leave during the period from September 1 through December 26, 1980, and was entitled to credit of only 36 hours he used 76 hours more sick leave than he accrued as a reemployed annuitant.

The accumulation of sick leave is governed by the provisions in 5 U.S.C. § 6307 under regulations of the Office of Personnel Management as authorized by 5 U.S.C. § 6311. These regulations provide that if an employee is indebted for unearned leave at the time of separation he must refund the amount paid him during the period covered by that leave. However, such a refund is not required if the employee is separated by reason of disability which prevents his returning to duty or continuing to work. 5 C.F.R. § 630.209; Matter of Sisco, B-188903, July 6, 1977. We presume that the Department has determined that a refund for excess sick leave is required under those provisions based

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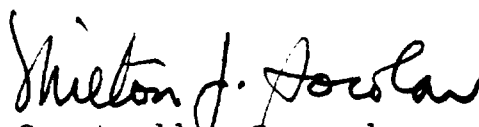
on a finding that Mr. Peterson was not disabled at the time of his retirement.

However, the debt resulting from the required refund for the excess leave taken may be considered for waiver under 5 U.S.C. § 5584. Under that provision erroneous payments of pay may be waived where collection of the erroneous payments would be against equity and good conscience and not in the best interests of the United States.

The regulations implementing this statutory provision provide in part:

"\* \* \* Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any other person having an interest in obtaining a waiver of the claim. \* \* \*"  
4 C.F.R. § 91.5(c).

Since the grant of excess sick leave resulted from a retroactive determination of the Grievance Board that he had erroneously been forced to remain in service after August 31, 1982, the excess leave was obviously granted in error. In the circumstances of this case, there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of Mr. Peterson. Accordingly, any debt which may result from the grant of excess sick leave to Mr. Peterson between September 1 and December 26, 1980, is hereby waived.

  
Acting Comptroller General  
- of the United States