Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Billy W. McDonald, et al.—Years of Service Credits—Annual Leave—Waiver

File: B-249410.3

Date: August 28, 1995

DIGEST

1. Seventeen retired members of the United States Park Police, United States Secret Service, and its Uniformed Division, who retired with annuities under the District of Columbia (D.C.) Police and Firefighters Retirement and Disability Act, and who were thereafter employed by the Federal Law Enforcement Training Center without a break in service, were credited with all their pre-retirement years of federal service for annual leave accrual purposes under 5 U.S.C. § 6303(a) (1988). They may not receive years of service credit for any pre-retirement years of federal civilian or military service used to compute their D.C. retirement annuity because their retirement deductions paid into the D.C. Retirement System may not be withdrawn and deposited into the Civil Service Retirement System. Retired D.C. Police Officers, B-256756, Apr. 11, 1995.

2. Seventeen retired members of the United States Park Police, United States Secret Service, and its Uniformed Division, who retired with annuities under the District of Columbia (D.C.) Police and Firefighters Retirement and Disability Act, and who were thereafter employed by the Federal Law Enforcement Training Center without a break in service, were credited with their annual and sick leave balances certified to their credit at their retirement. Under 5 U.S.C. § 6308(a), only unused annual leave may be credited. The sick leave balance of an individual who is receiving an annuity under the D.C. Retirement System and is thereafter employed in a position to which 5 U.S.C. § 6301, et seq., applies, may not be similarly credited.

3. Seventeen retired members of the United States Park Police, United States Secret Service, and its Uniformed Division, who retired with annuities under the District of Columbia Police and Firefighters Retirement and Disability Act, and who were thereafter employed by the Federal Law Enforcement Training Center, had their annual leave accrual rate erroneously established in the 8-hour category. On adjustment in 1992, the Center determined that use of overcredited annual leave in prior years resulted in negative leave balances for 12 employees. The value of

those hours is a debt due the United States subject to waiver. Waiver is granted of the debts which arose from use of overcredited annual leave prior to the 1992 leave year because the employees had no prior knowledge of the error. However, waiver is inappropriate for that part of the debt representing use of overcredited annual leave during the 1992 leave year after the debt was determined to exist and which resulted in a negative leave balance at the end of the 1992 leave year. Those debts may be recouped by permitting the employee to carry the leave debit into the succeeding leave year as a charge against leave to be earned or to refund the value of the excess leave used, as appropriate. 5 U.S.C. § 6302(f) and 5 C.F.R. § 630.208(c)(1) and (2).

DECISION

This decision responds to a request from the Director, Federal Law Enforcement Training Center (FLETC), Department of the Treasury.[1] It concerns the entitlement of 17 federal employees, who were retired with an annuity under the District of Columbia (D.C.) Police and Firefighters Retirement and Disability Act (D.C. Retirement Act),[2] and who were then employed by FLETC without a break in service, to carry over the annual and sick leave balances they had to their credit at their retirement and to be credited with all pre-retirement federal service for annual leave accrual purposes. If they are not entitled to that credit, we are asked to waive any debt that resulted from the required downward adjustment of their annual leave balances.

BACKGROUND

The FLETC is an interagency law enforcement training organization under the Department of the Treasury, providing the training needs for 71 federal agencies. Since at least the latter part of the 1970's, law enforcement personnel, who retired from those federal agencies and who were immediately employed by FLETC as instructors, were credited with their annual and sick leave balances and were placed in an annual leave accrual category based on all of their pre-retirement years of federal service. That practice was based on information contained in the Federal Personnel Manual (FPM) Supp. 296-33 and on advice received by FLETC from the Office of Personnel Management (OPM) as late as 1982.

During the period 1978 through 1991, 17 of the instructors hired by FLETC were retired members of the United States Park Police, the United States Secret Service, and the Uniformed Division of the Secret Service. Since they were retired from

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[1]Mr. Charles F. Rinkevich.

[2]Chapter 6 of title 4, D.C. Code (1994 Replacement Vol. 3A).

federal service, FLETC credited each of them with all their pre-retirement years of federal civilian and military service and with the annual and sick leave balances certified to their accounts at their retirement. They were each placed in the 8-hour annual leave accrual category (5 U.S.C. § 6303(a)(3) (1988)), since each had more than 15 years of federal service when employed by FLETC.

In 1991, that practice was questioned by FLETC and clarification was sought from OPM. By letter dated July 9, 1991, OPM advised FLETC that the information contained in the FPM Supp. 296-33, showing that the service of these retirees was creditable for annual leave accrual purposes, was inaccurate. The OPM letter stated that service under other contributory retirement systems may be credited for leave accrual purposes only where a deposit could be made to the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS) to obtain years of service credits. Since annuitants under the D.C. Retirement Act cannot withdraw their deductions paid into the D.C. Retirement System and deposit them into the CSRS or the FERS, their service cannot be credited for leave accrual purposes.

OPM instructed FLETC to remove any years of service credits used to compute the annuities of the 17 employees under the D.C. Retirement Act, adjust their service computation date, and recalculate their annual leave balances to reflect the required downward adjustment of their rate of annual leave accrual against their actual leave usage during their period of employment with FLETC.

Accordingly, FLETC removed credit for Park Police, Secret Service, and Uniformed Division service performed by each individual upon which his basic retirement under the D.C. Retirement Act was predicated and reestablished their service computation dates. The FLETC then adjusted the annual leave record for each affected employee to determine their proper annual leave balances for each year of employment. The adjustment left 12 of the 17 employees[3] with negative annual leave balances and significant debts to the United States.[4] On the assumption that such action was correct, FLETC now seeks to have those debts waived on behalf of those employees, asserting that the improper crediting was due to administrative

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[3]Harvey H. Cooper; Robert K. Cornwell; James H. Currey; Gilbert W. Griffiths; Billy W. McDonald; Donald G. Russell; John L. Sipe, Jr.; Walter F. Stevens; Allen F. Sullivan; Francis F. Uteg; Bobby R. Williams, Sr.; and James C. Woolfenden.

[4]The debts ranged from approximately $1,000, to approximately $13,000. FLETC also removed the credit for accumulated sick leave credited to each of them at the time of their retirement under the D.C. Retirement Act. However, that adjustment did not result in a negative sick leave balance for any of the affected employees.

error and the affected employees were neither aware of the error nor contributed to it.

In the meantime, one of the affected employees, on behalf of himself and others, challenged the 1991 ruling by OPM and the responding action by FLETC. The employees argue that the initial crediting of pre-retirement years of federal service was a matter of interpretation by OPM of existing law. Therefore, they contend that the 1991 OPM ruling is a new interpretation of the law, not merely the correction of an error, and that it should operate prospectively only. As a result, all individuals who were hired by FLETC prior to the new interpretation should be deemed "grandfathered" under the prior interpretation and thus, be permitted to retain all pre-retirement service credits and continue to accrue annual leave at the 8-hour rate authorized by 5 U.S.C. § 6303(a)(3) (1988).

OPINION

Years of Service Credit

The D.C. Retirement Act system, although enacted by the Congress and amended in 1957[5] to provide benefits substantially similar to benefits provided by the 1956 amendments to the CSRS, is not part of the federal retirement system. It is an independent retirement system covering D.C. Police officers and Firefighters, Park Police officers, and members of the Secret Service, and its Uniformed Division.[6] It is administered wholly by the D.C. government, with all retirement deductions withheld from the pay of those officers being deposited into that system.[7]

In our decision, Retired D.C. Police Officers, B-256756, Apr. 11, 1995, we ruled that D.C. Police officers, who retired under the D.C. Retirement System and who were thereafter employed by a federal agency, could not receive credit for any pre-retirement years of service used to compute their annuities under the D.C. Retirement Act because they could not withdraw their retirement deductions under that system and deposit them into the CSRS. By the same token, retired Park Police officers, and retired members of the Secret Service and its Uniformed Division may not be credited with any pre-retirement years of service used to compute their annuities under the D.C. Retirement Act upon post-retirement employment with a federal agency in a position which is under the CSRS or the

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[5]Pub. L. No. 85-157, Aug. 21, 1957, 71 Stat. 391.

[6]Members of the Park Police, Secret Service, and its Uniformed Division, hired on or after January 1, 1984, are covered by FERS, not the D.C. Retirement System.

[7]Title 4, D.C. Code, §§ 4-601 to 4-634 (1994 Replacement Vol. 3A).

FERS. Once these individuals retire and begin receiving an annuity under the D.C. Retirement Act, they are no longer eligible to withdraw their retirement deductions from that system and deposit them into the CSRS or the FERS. Thus, under OPM's 1991 guidance and Retired D.C. Police Officers, supra, the 17 employees of FLETC are not entitled to the service credit they claim.

The right of a federal employee to be credited with pre-retirement years of service for additional retirement benefits, where applicable, and for annual leave accrual purposes, is dependent solely on statute and implementing regulations. The regulations implementing a statute must be consistent with the language and intent of the statute. If a substantive error is made in a regulation which is inconsistent with the authorizing statute, that error does not bind the federal government, nor is the federal government estopped from correcting that error.[8] Therefore, once the error involved here was discovered by OPM, the action taken by OPM to correct the FPM Supp. 296-33 and its earlier erroneous statements was required and applies to the date each affected employee began post-retirement employment with FLETC. See 5 U.S.C. §§ 6303(a) and 8334(d) (1988).

Thus, years of service credit for prior federal service may only be allowed if the credits are paid for by deposits of required retirement deductions. Absent such deposits, credit for retirement purposes under the CSRS or the FERS may not be allowed for such service and, in turn, that service is not creditable for the purpose of annual leave accrual under 5 U.S.C. § 6303(a). Therefore, FLETC properly eliminated service credit for these 17 employees.

There is, however, a further problem. The service computation date is used to determine an employee's rate of accrual of annual leave, his status in a reduction-in-force, and ultimately, his years of creditable service for annuity computation purposes under the CSRS or the FERS.[9] In the present cases, the majority of these 17 individuals performed active military service and all but a few of them performed periods of civilian federal service prior to the date they entered duty with the Park Police, Secret Service, or its Uniformed Division.

The correspondence from FLETC states that in the process of adjusting the employees annual leave records downward, "all known creditable service for military and other civilian federal service (independent of that with the Park Police) was identified and credited to the employees' records." If FLETC credited each of the affected employees with all the federal service, both civilian and military, performed prior to their service with the Park Police, Secret Service, or its

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[8]Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

[9]5 U.S.C. §§ 3502, 6303(a), 8332(c)(1), and 8411 (1988).

Uniformed Division, their service computation dates may have been incorrectly adjusted.

Federal civilian service performed by these individuals prior to their entry on duty with the Park Police, Secret Service, or its Uniformed Division, was includable as "government service"[10] for the purpose of computing an annuity under the D.C. Retirement Act. The documents in the file show that the individuals, who had performed federal civilian service in a position under the CSRS prior to their law enforcement service, received a refund of their retirement deductions in the CSRS and purchased those years of service by depositing the retirement deductions in the D.C. Retirement System at approximately the time they retired, thus increasing their D.C. annuity. Under the 1991 OPM directive, since the deposits made into the D.C. Retirement System for that prior service could not then be withdrawn and deposited into the CSRS or the FERS when they began their employment with FLETC, the prior service may not be used to establish an earlier service computation date.

Likewise, with regard to each individual's prior active military service, that service is also includable for D.C. Retirement Act annuity computation purposes.[11] We have been informed by OPM that if any of the 17 individuals had their military service included as years of service for their annuity computation under the D.C. Retirement Act, such years of service may not be credited for retirement purposes under the CSRS or the FERS, or for annual leave accrual purposes under 5 U.S.C. § 6303(a) incident to their employment with FLETC.

Since FLETC apparently credited such prior civilian and military service for these employees, FLETC must recalculate their service computation dates and their annual leave accounts in accordance with OPM's guidance.

ANNUAL AND SICK LEAVE BALANCES

Each of the 17 individuals, who were employed by FLETC without a break in service following their retirement under the D.C. Retirement Act, had unused annual and sick leave to their credit at their retirement. Under the provisions of 5 U.S.C. § 6308(a), these individuals were properly credited with their unused annual leave upon post-retirement employment with FLETC. However, their sick leave balances may not be so credited. Section 6308(a) of title 5, United States Code, states that,

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[10]See section 4-607(15) of title 4, D.C. Code (1994 Replacement Vol. 3A).

[11]Section 4-610(b)(1) of title 4, D.C. Code (1994 Replacement Vol. 3A).

when an individual receiving an annuity under sections 521-535 of title 4, D.C. Code,[12] is reemployed in a position to which 5 U.S.C. § 6301, et seq., applies, his sick leave balance may not be re-credited to his account.[13] As stated above, FLETC has adjusted the sick leave balances of the 17 employees and none of them have a negative balance.

WAIVER OF COLLECTION

Waiver of collection of a debt under the provisions of 5 U.S.C. § 5584 (1988) is an equitable remedy. Because of its equitable nature, waiver must depend on the particular facts involved, since by statute, "an indication of . . . fault, or lack of good faith on the part of an employee or any other person having an interest in obtaining a waiver of the claim" precludes waiver.[14] The word "fault" includes more than a proven overt act or omission by an employee. We consider fault to exist if in light of all of the facts it is determined that the employee, once he becomes aware of possible error, fails to take action to have the matter corrected or to prevent it from continuing.

In the present cases, upon notice to FLETC by OPM in 1991, action was initiated to remove the erroneous years of service credits from the records of each of the affected employees, to change their service computation date, and adjust their annual leave accrual rate from 8 hours a pay period to 4 hours or 6 hours a pay period, depending on their otherwise proper years of creditable service, as reduced, when they began their employment with FLETC. The initial computation of excess annual leave usage was through March 21, 1992, and the affected employees were informed at approximately the same time regarding both the required change in their rate of annual leave accrual and the need to retroactively adjust their annual leave balances to account for their leave usage.

We are unable to determine from the documents in the file whether the annual leave usage in the early part of the 1992 leave year by any of the affected employees resulted in their annual leave account having a negative leave balance that year, effective the date of the initial computation (March 21, 1992). However, we note from those documents that some of them had negative leave balances at

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[12]The D.C. Retirement Act, currently in chapter 6 of title 4, D.C. Code (1994 Replacement Vol. 3A).

[13]See also section 4-610 of title 4, D.C. Code (1994 Replacement Vol. 3A) authorizing the inclusion of unused sick leave for annuity computation purposes for those who are otherwise eligible for an annuity under the D.C. Retirement Act.

[14]5 U.S.C. § 5584(b)(1) (1988).

the close of that leave year (January 9, 1993). Thus, it appears that, while some of the affected employees took action to prevent having a negative leave balance at the end of the 1992 leave year, others used leave during the remainder of that year in such a manner to either cause or contribute to the existence of the negative leave balance at the end of the 1992 leave year. Therefore, we hereby waive the debts of these 12 employees[15] determined to be due incident to excess annual leave usage for the period of their employment with FLETC through the end of leave year 1991 (January 11, 1992). However, waiver is inappropriate for that part of the debts which arose after March 21, 1992, for those employees whose leave usage during the 1992 leave year resulted in a negative leave balance at the end of that leave year. In this connection, section 6302(f) of title 5, United States Code (1988), provides that where a debt rising from use of excess annual leave is not waived, the value of the excess leave used may be refunded by the employee by lump-sum or installment payments, or by having the excess leave carried forward as a charge against later accruing annual leave.[16]

Therefore, in the cases where the affected employees had a negative annual leave balance at the close of the 1992 leave year (January 9, 1993), it is appropriate to permit any negative annual leave balance to be charged against their annual leave accrual in leave year 1993. However, if such a charge made now would cause a negative leave balance to occur for the 1993 leave year because annual leave was otherwise properly taken during that year, the employee is required to refund the value of that excess leave at the pay rate in effect at the end of the 1992 leave year.

/s/Seymour Efros
for Robert P. Murphy
General Counsel

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[15]Footnote 4, supra.

[16]See also 5 C.F.R. § 630.208(c)(1) and (2) (1995).