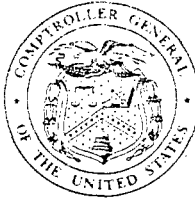


PLM-11  
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**DECISION**



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

9379

FILE: B-191501

DATE: March 8, 1979

MATTER OF: Health Service Director - Peggy S. Pentz, PHS

*Entitlement to Receive Credit for Civil Service Employment Towards Retirement*

DIGEST: Claimant was employed in a civilian capacity (Foreign Service Reserve Officer) by the International Cooperation Administration (ICA), Department of State, in which Public Health Service (PHS) was participating. She later became a PHS commissioned officer on active duty detailed by them to the ICA to do the same work at the same location. Employment in a civilian capacity does not qualify under 42 U. S. C. 212, as being "with" the PHS for the purpose of receiving years of service credit towards retirement as a PHS commissioned officer, even though the individual may have been supervised by PHS employees detailed to ICA under agreement for work on ICA projects, since such supervisory authority as they may have had emanated from the ICA, not the PHS.

DLG 0415  
AGC 160

This action is in response to a letter dated March 17, 1978, with enclosures, from Delbert A. Larson, Director, Commissioned Personnel Operations Division, Public Health Service (PHS), requesting an advance decision concerning the entitlement of Health Services Director Peggy S. Pentz (0-6), to receive credit for 5 years of civil service employment towards retirement as a member of the Commissioned Corps of the PHS.

The submission states that Ms. Pentz was appointed a member of the inactive reserve of the commissioned officer corps of the PHS on September 26, 1957, but that no active duty positions were available at that time. In 1958, the PHS, in cooperation with the International Cooperation Administration (ICA), Department of State, recruited her for an international health assignment. However, since no PHS active commissioned officer corps positions were available to her in her field of public health education for this purpose, Ms. Pentz accepted an appointment as a Health Education Advisor, Foreign Service Reserve, with the ICA, effective December 13, 1958, for service in the Public Health Division of the U. S. Operations Mission in Honduras.

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Ms. Pentz served in the capacity as a civilian employee of the ICA from then until September 8, 1964. We understand that during that time she performed several overseas assignments as an employee of the ICA in the field of health education. It is indicated that although her salary was paid by the ICA and she was counted on that organization's rolls for employment purposes, she was supervised in large part by PHS officers and employees who unlike Ms. Pentz, were detailed from their employment with the PHS to the ICA for the purpose of these cooperative efforts in international health.

On September 8, 1964, Ms. Pentz terminated her employment with the ICA and accepted an active duty appointment in the PHS as a member of their commissioned officer corps. Upon acceptance of that appointment she was immediately detailed by the PHS to the same program that she had been working in while an employee of the ICA. Her duties and location remained the same until she was later reassigned by the PHS.

The submission goes on to state that Ms. Pentz has requested that the last 5 years of her civilian employment with the ICA be credited toward her retirement from the PHS based on certain of the language contained in 42 U.S.C. 212. That section authorizes in subsection (a) thereof, retirement of PHS commissioned officers upon completion of 30 years of active service or 20 years of active service of which not less than 10 years are commissioned service in any of the uniformed services. That section also provides in pertinent part in subsection (d):

"(d) The term 'active service,' as used in subsection (a) of this section, includes:

\* \* \* \* \*

"(2) active service with the Public Health Service, other than as a commissioned officer, which the Surgeon General determines is comparable to service performed by commissioned officers of the Service \* \* \*." (Underscoring supplied.)

The submission points out that the before-quoted language of subsection (d)(2) was derived from section 4 of Public Law 86-415,

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approved April 8, 1960, 74 Stat. 32, 34, as an amendment to section 211 of the Public Health Service Act (42 U. S. C. 212). Prior to such amendment, active service was defined to include active commissioned or noncommissioned service in the PHS. The submission further points out that the legislative history of Public Law 86-415, *supra*, is not instructive as to what is meant by the new phrases "with the Public Health Service" and "comparable to service performed by commissioned officers," and that no regulations or commissioned corps policy issuances have been promulgated to clarify this section of the Public Health Service Act.

The submission suggests that Ms. Pentz's Civil Service time should meet the requirements of comparable service inasmuch as she performed the same duties at the same location after being called to active duty as a member of the PHS commissioned officer corps as she was performing in a civilian capacity as an employee of the ICA before her active duty appointment. From the comparability standpoint, the PHS did employ commissioned officers who were public health education specialists and who did perform services similar to those performed by Ms. Pentz.

Notwithstanding the foregoing, the submission recognizes as critical the issue as to whether Ms. Pentz's civilian employment with the ICA could be considered "with" the PHS as stipulated in the law.

The International Cooperation Administration was created by Executive Order 10,610, May 9, 1956, under authority of the Mutual Security Act of 1954, 68 Stat. 855, 22 U.S.C. 1750 *et seq.* and was the successor organization of the Foreign Operations Administration. By that Executive Order, the ICA was to be organized as a semi-autonomous agency within the Department of State under a single director, who was to report to and be subject to the direction and control of the Secretary of State.

The purpose for the organization was to render assistance to other countries through economic and defense support, technical assistance and other special programs, functioning through United States Operations Missions in the participating countries. In order to carry out these purposes, various other Federal agencies were to contribute where appropriate, equipment, materials and services, as well as the detailing of their own personnel to the ICA who had special technical and professional skills in the needed fields being contributed.

As the foregoing relates to PHS participation, a Memorandum of Agreement between the ICA and the Department of Health, Education and Welfare, dated August 27, 1956, provides in pertinent part as follows:

"The Department of Health, Education, and Welfare (HEW) has an interest in furthering the foreign policy objectives of the United States Government as they are embodied in the foreign economic aid and technical cooperation programs, especially in those fields in which HEW has special technical competence. In view of this mutuality of interest, and in view of HEW's competence in the fields of health, education and welfare, it is therefore mutually agreed that HEW will assist ICA in carrying out certain aspects of the foreign operations program.

"Working relationships, within which assistance may be requested by ICA and provided by HEW, will be established in accordance with the following general principles:

\* \* \* \* \*

"2. In carrying out its activities \* \* \* HEW, will participate within the framework of ICA's evaluation process, in ICA's evaluation of programs in HEW fields of recognized professional competence.

"3. The Public Health Service, with the assistance of the Children's Bureau, will serve as the primary recruitment agent for ICA health personnel.

\* \* \* \* \*

"5. In accordance with general ICA training policies, the Public Health Service and the Children's Bureau, will arrange or conduct training programs for ICA training participants in the health field."

It is within the context of the foregoing that the question of the claimant's entitlement to retirement credit arises.

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While on assignment in the United States Overseas Mission in Honduras as an ICA employee, Ms. Pentz worked under the supervision of PHS employees at that location. It is suggested by this that such PHS employees by virtue of their supervisory status had the power to remove her from her position, have her recalled and possibly even had the right to have her discharged for cause. Even assuming the existence of all of these supervisory rights, the question remains from whence these supervisory rights were derived.

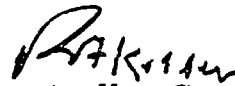
As previously stated, the ICA, by that and other names, was organized, as a semi-autonomous agency within the Department of State, and administered by a director who was responsible to the Secretary of State. It had the authority to hire individuals as employees whose salaries were payable directly from ICA funds and to "borrow" employees from other agencies for their administrative and technical abilities in their respective fields. Clearly then, those employees of agencies like PHS, were loaned or detailed to the ICA to work on ICA controlled projects. Thus, while the services performed by these borrowed employees in combination with ICA employees were in the nature of a team effort, such authority as the loaned employees were given as project supervisors, in the administrative sense, emanated from the ICA rather than from their own agencies. In this regard, there is nothing in the file which in any way indicates or suggests that the PHS as an entity or the Surgeon General as head of that agency had any authority over a civilian employee of the ICA.

In the present case, Ms. Pentz, although she held an inactive commissioned officer status in the PHS between 1958 and 1964, was employed by the ICA as a Foreign Service Reserve Officer during that time and had no other Federal employment status. While she may have performed her job as part of a health team under the supervision of one or more PHS officers, those individuals serving in that capacity, because they themselves were "borrowed" from the PHS and detailed to ICA, did not derive their administrative authority from PHS, rather it came from the ICA.

Therefore, it is our view, that since Ms. Pentz was a civilian employee of the ICA on ICA projects subject to ICA discipline and control during the period in question, none of that service may be considered as "with" the PHS for the purposes of 42 U.S.C. 212 and your question is answered in the negative.

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The collateral question as to whether retirement credit in the commissioned officer corps of the PHS may be granted for service performed with an agency that is now part of the PHS but was not a part of that agency when the service was performed has been presented. The answer to that question would depend on the enabling legislation authorizing transfer of that activity or function to the PHS. In the absence of a specific situation involving such a transfer, we do not feel that the question can be properly considered and resolved.



Deputy Comptroller General  
of the United States