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DECISION



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

FILE: B-198627

DATE: November 7, 1980

[Claim for]
MATTER OF: Jon P. Kindice - Recredit of sick leave
after break in service *]*

DIGEST: Although Foreign Service officer of Agency for International Development suffered involuntary reduction in force in 1974 and sought Federal employment unsuccessfully until 1979, resulting break in service in excess of 3 years precludes recrediting of previously earned sick leave. Office of Personnel Management regulation at 5 C.F.R. 630.502(b)(1) as further implemented by 3 FAM 493.3 has force and effect of law and neither this Office nor agency concerned may waive or grant exceptions to that regulation. See cases cited.

Mr. Arthur D. Schantz, Chief of the Employee Services Division, Office of Financial Management, Agency for International Development, requests a decision on the claim of Mr. Jon P. Kindice for reinstatement of 816 hours of sick leave. In accordance with the following analysis Mr. Kindice's claim may not be allowed.

Mr. Kindice, a Foreign Service officer with the Agency for International Development, was reemployed on May 27, 1979, after a break in service of 4 years, 5 months, and 3 days, which followed his separation from the agency on August 24, 1974, due to a reduction in force. Mr. Kindice's claim involves the recredit of 816 hours of sick leave which were carried to his credit at the time of the August 1974 separation. In essence Mr. Kindice contends that since his separation was involuntary and since he actively sought Government employment during the interim period from August 1974 to May 1979 when he was reemployed, he should be allowed to have the sick leave hours to his credit at the date of his separation recredited to his presently existing sick leave balance.

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Section 1151 of title 22, United States Code, makes the annual and sick leave provisions of subchapter I of chapter 63, title 5, United States Code, applicable to Foreign Service officers. And, since section 6311 of title 5, United States Code, authorizes the Office of Personnel Management (OPM) to prescribe regulations necessary for the administration of that subchapter, the following pertinent part of the OPM regulation appearing at 5 C.F.R. 630.502(b)(1)(1979) is applicable to the evaluation of Mr. Kindice's claim:

"* * * an employee who is separated from the Federal Government or the government of the District of Columbia is entitled to a recredit of his sick leave if he is reemployed in the Federal Government or the government of the District of Columbia without a break in service of more than 3 years."

Further implementing instructions - uniformly applicable among foreign affairs agencies such as the Agency for International Development and necessarily consistent with the OPM regulation set out above - are contained in section 493.3 of Volume 3, Foreign Affairs Manual (FAM), which provides as follows:

" 493.3 Recredit of Sick Leave
Upon Reemployment

"If a former employee is reemployed in the Service with a break in service not in excess of 3 years, his sick leave account is reinstated by the employing agency for credit or charge. This applies to reemployments which occur on or after January 9, 1962, the effective date of the extension in the length of the permissible break in service from 52 calendar weeks to 3 years. "

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In a decision resembling the action here, Alice M. Thornton, B-188913, October 17, 1977, the claimant suffered a reduction in force from her position with the Department of Agriculture effective January 7, 1972, and was not subsequently reemployed in the Federal service until March 31, 1975 - a period of about 3 years and 3 months. The claimant acknowledged that under the applicable regulation a break in service could not exceed 3 years in order for sick leave to be recredited, but she contended that an exception should be made in view of the reduction in force and the fact that she tried on several occasions and without success to seek employment in the Federal service. Noting that the regulation contained at 5 C.F.R. 630.502(b)(1) was issued pursuant to 5 U.S.C. 6311 and therefore had the force and effect of law, we held in the Thornton case that neither our Office nor any agency in the executive branch of the Government had the authority to waive or grant exceptions to the regulation's proscription against recrediting sick leave following a break in service in excess of 3 years. See also William F. Gallo, B-180604, April 9, 1974.

We find that Mr. Kindice's claim is similarly precluded by the consistent operation of the provisions of 5 C.F.R. 630.502(b)(1) and 3 FAM 493.3 which prohibit the recrediting of sick leave after a break in service in excess of 3 years. Therefore, regardless of the alleged equitable circumstances surrounding Mr. Kindice's claim, this Office is without authority to order or allow that which the law does not permit. The claim is denied.

Harry K. Van Allen
For the Comptroller General
of the United States