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Mr. Gunitz

PLM 2



DECISION

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

[Obligation To Repay Portion of]

FILE: B-200327

DATE: November 13, 1980

MATTER OF: William A. Bonin--Waiver, lump-sum
leave payment

- DIGEST: 1. A lump-sum payment for unused annual leave which is correctly and legally made to a Federal employee upon his separation from Government service may not later be considered an "erroneous" payment within the meaning of the statute authorizing waiver of erroneous overpayments of compensation, even though the employee concerned accepts another Federal appointment without any awareness that he will then become legally obligated to refund part of that lump-sum leave payment by accepting reemployment. Hence, collection of the employee's resulting debt may not be waived. 5 U.S.C. 5584.
2. If an agency hires an individual returning to Government employment after a short break in service who is obligated to refund a portion of the lump-sum annual leave payment he received incident to his earlier separation from service, but the agency erroneously fails to collect the refund and recredit the leave it represents to him on the date of reemployment, leave which cannot later be recredited because it is subject to forfeiture limitations may be restored to a separate leave account under the leave restoration provisions of 5 U.S.C. 6304(d).

This action is in response to a letter dated September 5, 1980 (file reference EBM-ADM-Fin), with enclosures, from Mr. Lorin D. Anderson, Authorized Certifying Officer, United States Department of the Interior, who requests

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an advance decision on the question of whether a Federal employee may be relieved of his legal obligation to refund a portion of his lump-sum leave payment when the employee (1) is separated from Government employment, (2) receives a lump-sum payment for unused accumulated and accrued annual leave at the time of separation, and (3) then secures reemployment with the Government before the end of the period covered by the lump-sum leave payment.

We have concluded that the employee may not lawfully be relieved of his obligation to refund a portion of lump-sum leave payment in these circumstances. However, he is entitled to a recredit of leave in return for the repayment he makes.

The particular employee concerned, Mr. William A. Bonin, is a physical scientist who worked with the Soil Conservation Service of the Department of Agriculture at Durham, New Hampshire, prior to July 28, 1978. On that date he was involuntarily separated from Government service, apparently because he was unwilling to accept a transfer to another position outside the State of New Hampshire. He then received a lump-sum payment of \$3,952.95 for the 357 hours of unused accumulated and accrued annual leave he had at the time of his separation, plus one 8-hour Labor Day holiday, covering the period from July 29 to October 2, 1978.

On September 24, 1978, Mr. Bonin was appointed to a new position with the Department of the Interior in New Hampshire. On or about May 13, 1980, officials of that agency discovered through a review of Mr. Bonin's leave records that his appointment had occurred prior to the expiration of the period covered by the lump-sum annual leave payment he had received from the Department of Agriculture. They then calculated that he was obligated to refund \$487.35 of that lump-sum leave payment to the Government. This calculation was based on 45 hours of annual leave for which he had been paid by the Department of Agriculture covering the period from

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September 24 to October 2, 1978, when he had also been drawing a salary from the Department of the Interior.

On May 15, 1980, the Department of the Interior issued a Bill for Collection for \$487.35 to Mr. Bonin. Mr. Bonin objected to repayment inasmuch as he was not at fault with respect to the overpayments. For this reason, and because he had previously paid \$175.45 in income taxes on the amount he was being asked to refund, he suggested that collection of the \$487.35 would be unfair, and he requested that the claim against him be waived under the statutory authority of 5 U.S.C. 5584.

However, on August 7, 1980, the Waiver Review Board of the Department of the Interior denied Mr. Bonin's request. In substance, the members of the Review Board concluded that his \$487.35 debt could not be considered for waiver as an "erroneous" overpayment under the provisions of 5 U.S.C. 5584, since the \$487.35 was part of a lump-sum leave payment which had been proper when made. The Review Board further concluded that waiver would improperly endorse double pay for Mr. Bonin for the period between September 24 and October 2, 1978.

Mr. Bonin has since questioned the correctness of the conclusions reached by the Waiver Review Board. In essence, he suggests that if it was improper for him to draw double pay for the period between September 24 and October 2, 1978, then the Department of the Interior must have erred in hiring him before October 2, 1978. Thus, he suggests that either the Agriculture Department's lump-sum leave payment or the Interior Department's salary payment should be regarded as "erroneous" and should serve as a basis for waiver of the amount now being claimed from him.

In the request for an advance decision addressed to our Office, the certifying officer questions whether

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Mr. Bonin may lawfully be relieved of his obligation to pay the \$487.35 claimed against him.

Provisions of statutory law which govern the conditions of Federal employment are contained in title 5 of the United States Code. Section 5551 of that title provides that an employee who is separated from Government service is entitled to receive a lump-sum payment for accumulated and accrued annual leave in an amount equal to the pay he would have received had he remained in the service until expiration of the period of the annual leave. Section 6306 of that title further provides in pertinent part that:

"(a) When an individual who received a lump-sum payment for leave under section 5551 of this title is reemployed before the end of the period covered by the lump-sum payment * * * he shall refund to the employing agency an amount equal to the pay covering the period between the date of reemployment and the expiration of the lump-sum period.

"(b) * * * When an individual is reemployed under the same leave system, an amount of leave equal to the leave represented by the refund shall be recredited to him in the employing agency. * * *"

We have expressed the view that these provisions of law contemplate immediate repayment by the individual concerned of that part of the lump-sum payment which is to be refunded and such requirement ordinarily should be a condition precedent to reemployment. 34 Comp. Gen. 17, 19 (1954). Also, the leave should be recredited to the individual and his leave account reconstructed as of the date of reemployment. 38 Comp. Gen. 91 (1958).

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The law authorizing the waiver of claims against Federal employees arising out of overpayments of compensation, 5 U.S.C. 5584, provides in pertinent part that:

"(a) A claim of the United States against a person arising out of an erroneous payment of pay or allowances * * * to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part * * *." (Underscoring added.)

Our Office has consistently ruled that a lump-sum payment for leave which was correct and legal when made may not later be considered an "erroneous" payment within the meaning of 5 U.S.C. 5584. This is so even though the employee concerned accepts another Federal appointment without any awareness that he has become legally obligated to refund a portion of the lump-sum leave payment by accepting reemployment. See, e.g., B-171325, February 2, 1971; and compare 55 Comp. Gen. 48 (1975).

In the present case, it appears that the \$3,952.95 lump-sum leave payment made to Mr. Bonin upon his separation from the Department of Agriculture on July 28, 1978, was correct and legal when made. Hence, no portion of that payment may now be regarded as "erroneous" within the meaning of the waiver law, 5 U.S.C. 5584.

It further appears that there was nothing illegal or improper about Mr. Bonin's acceptance of a new position with the Department of the Interior on September 24, 1978, prior to the expiration of the lump-sum leave payment period on October 2, 1978. In that connection, it is to be noted that the above-quoted provisions of 5 U.S.C. 6306 merely required that he refund that portion of the lump-sum leave payment

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covering the period from September 24 to October 2, 1978, and did not bar him from reemployment. Hence, a salary was properly paid to Mr. Bonin by the Department of the Interior for the period from September 24 to October 2, 1978, and that salary payment may not serve as a basis for any grant of waiver under 5 U.S.C. 5584.

It is therefore our view that the gross amount of compensation representing the unexpired leave, or \$487.35, must now be collected from Mr. Bonin to satisfy the requirements imposed by 5 U.S.C. 6306(a). Any questions concerning the tax consequences of the collection would be matters for determination by the concerned revenue authorities. See 33 Comp. Gen. 191 (1953); 24 Comp. Gen. 522 (1945).

In addition, it is to be noted that under the previously quoted provisions of 5 U.S.C. 6306(b), Mr. Bonin should have been reccredited with 45 hours of annual leave at the time of his reemployment. However, because Mr. Bonin's obligation to refund the unexpired portion of his lump-sum leave payment was not discovered until the middle of the 1980 leave year, the unexpired leave was not properly reccredited in September 1978. Information contained in the file indicates that if those 45 hours were now to be constructively reccredited to his regular annual leave account effective the date of his reemployment on September 24, 1978, then they would be constructively forfeited at the end of the 1979 leave year due to maximum annual leave carryover limitations imposed by law. Since this forfeiture is not the result of any fault on Mr. Bonin's part, but a consequence of the agency's failure to properly reccredit his leave account of the time of reappointment, the 45 hours of annual leave may be restored to a separate leave account established for Mr. Bonin under the statutory provisions of 5 U.S.C. 6304(d), requiring restoration of annual leave forfeited through administrative error. In that connection, while a factual determination of "administrative error"

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under 5 U.S.C. 6304(d) is ordinarily a matter for resolution by the employing agency and not our Office, in our view the existence of error has been demonstrated beyond any question by the circumstances presented in this case. Compare 55 Comp. Gen. 784 (1976).

In summary, Mr. Bonin is legally obligated to refund \$487.35 of the lump-sum annual leave payment he received incident to his separation from the Department of Agriculture on July 28, 1978, due to the fact that he accepted reemployment with the Department of the Interior on September 24, 1978, prior to the expiration of the lump-sum leave payment period on October 2, 1978. Collection of the \$487.35 may not be waived under the authority of 5 U.S.C. 5584, nor may Mr. Bonin otherwise be lawfully relieved of his obligation to make repayment. However, Mr. Bonin is entitled to have the amount of annual leave represented by that repayment recredited and restored to a separate leave account under 5 U.S.C. 6304(d).

Harry R. Van Cleave
For The Comptroller General
of the United States