

DECISION



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

FILE: B-204628

DATE: July 7, 1982

MATTER OF: John G. Dardis

DIGEST: Where employee was reinstated to employment with Department of State after an unwarranted separation, his excess annual leave should have been credited to a separate leave account established pursuant to 5 U.S.C. § 5596(b)(1)(B)(i). Failure to so credit annual leave constituted administrative error under 5 U.S.C. § 6304(d)(1)(A).

By letter dated June 30, 1981, Mr. John G. Dardis, through his attorney Mr. Edward H. Passman, has appealed the settlements dated March 2 and June 17, 1981, which denied his claim for the restoration of 200 hours of forfeited annual leave. Such leave was forfeited at the end of the 1979 leave year since it was in excess of his maximum permissible carryover of annual leave. Mr. Dardis was separated from the Department of State on September 27, 1979, and subsequently returned to duty, retroactively effective, since the separation was not warranted. For the following reasons certain annual leave credits should be restored to Mr. Dardis under 5 U.S.C. § 6304(d)(1)(A).

Mr. Dardis, a Foreign Service Reserve Officer, Class 2, was advised on May 30, 1979, that his appointment with the Department of State would be terminated effective September 30, 1979. In view of his prospective separation, Mr. Dardis indicated a desire to transfer to his previous employer, the Office of Naval Research, Department of the Navy. As the Office of Naval Research preferred that Mr. Dardis commence his reemployment with them prior to his September 30, 1979 scheduled termination from the Department of State he was separated from his employment with the Department of State effective September 27, 1979. This separation is evidenced by Notification of Personnel Action Form (DS-1032), dated October 2, 1979. On the basis of its determination that Mr. Dardis was not entitled to reinstatement rights under the Foreign Service Act of 1946, the Office of Naval Research declined to appoint him to a position therein. We note that the Navy's refusal to reemploy Mr. Dardis was upheld by final decision of the Merit Systems Protection Board dated January 7, 1982.

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A Notification of Personnel Action Form (DS 1032), dated November 28, 1979, shows that the personnel action separating Mr. Dardis on September 27, 1979, was retroactively cancelled. By letter dated January 8, 1981, the agency advised that the separation of September 28, 1979, had been voided because "it was not warranted" and that upon cancellation of the separation, Mr. Dardis had received backpay, including leave accrual retroactive to September 28, 1979. We note that the record does not indicate the basis on which the Department of State reinstated Mr. Dardis with backpay.

On December 31, 1979, Mr. Dardis instituted a grievance with the Department of State concerning his employment status. In a grievance decision dated July 2, 1980, the Foreign Service Grievance Board held that the agency decision to terminate Mr. Dardis was "unadmissibly arbitrary" and directed in part that his termination be rescinded and that he be reinstated.

In view of the determination made on November 28, 1979, to reinstate Mr. Dardis and the subsequent action by the Grievance Board concluding that he had been improperly terminated and entitled to reinstatement, the agency's payment of backpay, including leave accrual, for the period retroactive to September 27, 1979, may be regarded as a proper award of backpay pursuant to the Back Pay Act, 5 U.S.C. § 5596.

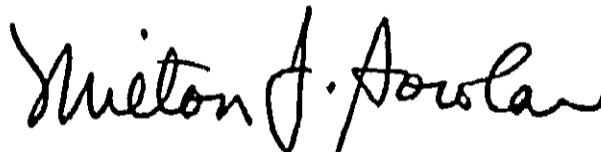
Under the provisions of 5 U.S.C. § 5596(b)(1)(B)(i) annual leave in excess of the maximum allowable annual leave accumulation is properly for crediting to the separate leave account established thereunder. See Matter of Sargent, 57 Comp. Gen. 464 (1978), and Matter of Oliver, 59 id. 395 (1979). Thus, on the actual date that Mr. Dardis reported back to work following his reinstatement with the Department of State his annual leave account including the leave to his credit at the time of the erroneous separation plus that accrued during the period of erroneous separation should have been restored. The amount in excess of his maximum permissible carryover should have been credited to a separate leave account established in accordance with 5 C.F.R. § 550.804(f). Any leave earned subsequent

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to that date in the 1979 leave year would be forfeited if not used before the beginning of the new leave year under 5 U.S.C. § 6304(a).

Subsection 6304(d)(1)(A) of title 5, United States Code, provides for the restoration of annual leave in excess of the maximum permissible carryover under section 6304 where the leave was forfeited because of administrative error. The agency's failure to credit excess leave accumulation to a separate leave account upon Mr. Dardis' reinstatement constituted administrative error under 5 U.S.C. § 6304(d)(1)(A). Accordingly, the annual leave forfeited by Mr. Dardis at the end of the 1979 leave year due to the agency's failure to establish a separate leave account pursuant to 5 C.F.R. § 550.804(f) may be restored under 5 U.S.C. § 6304(d)(1)(A).

In accordance with the above, such leave should be credited to a separate leave account in order to be available for use in accordance with 5 C.F.R. § 630.306.



Acting Comptroller General
of the United States