

**DECISION**



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

**FILE:** B-215542

**DATE:** August 1, 1985

**MATTER OF:** Ronald E. Ferguson

**DIGEST:**

1. An employee of the FAA was on leave without pay while performing active duty for training in the Army Reserve. The agency delayed the employee's periodic step increase based on the period of time he was in leave-without-pay status. The agency acted erroneously since under applicable regulations time spent in leave-without-pay status due to military service is creditable service in the computation of a waiting period for purposes of the periodic step increase, and no distinction is made between active duty for training and other active duty.
  
2. An employee of the FAA was on leave without pay while performing active duty for training in the Army Reserve. The employee was erroneously advised that he would be accruing annual leave during the period he was in leave without pay status, and consequently exhausted his leave. The Government is not bound by the erroneous acts of its agents and such advice does not provide a basis for allowing leave to be credited to the employee where applicable regulations provide for reduction in leave accumulation while the employee was in a leave-without-pay status.

This action is in response to a request for an advance decision from the Federal Aviation Administration.<sup>1/</sup> The agency asks whether an employee in leave without pay status, performing active duty for training, may be credited with annual leave for that period of military duty. The agency

<sup>1/</sup> The request was made by Paul K. Bohr, Federal Aviation Administration, Regional Director, Great Lakes Region, Des Plaines, Illinois.

also asks whether the time spent on active duty for training in a nonpay status should be counted as creditable service in determining whether to grant a within-grade increase to such employee. We find that annual leave may not be granted to an employee in a leave-without-pay status performing active duty for training. However, time spent on active duty for training in a nonpay status should be counted as creditable service in determining whether an employee may receive a periodic step increase.

Mr. Ronald Ferguson, an aviation safety inspector for the Federal Aviation Administration, also is a member of the U.S. Army Reserve. He was ordered to active duty for training beginning July 26, 1983, for a period of 255 days. During this period, he used several categories of leave, including 1,168 hours of leave without pay. It is this period of leave without pay with which we are concerned in this case.

#### Periodic step increase

Mr. Ferguson received a periodic step increase (within-grade increase) to GS-13, step 4, on July 11, 1982. His next increase was to have been to step 5 on July 8, 1984 (104 weeks from the July 11, 1982 increase). However, upon his return from active duty for training, Mr. Ferguson was told that due to the time he spent in leave-without-pay status, the waiting period for the periodic step increase would be extended to January 20, 1985.

It is the agency's position that the period spent in leave-without-pay status for active duty for training does not qualify as creditable service in determining whether to grant a periodic step increase. The agency contends that a distinction is made between service on active duty and service on active duty for training, and therefore the periodic step increase was properly denied.

A number of statutory and regulatory authorities are involved in this issue. Sections 2021-2026 of title 38, United States Code<sup>2/</sup> set forth reemployment rights of veterans who hold nontemporary positions in the Government. Under 38 U.S.C. § 2024(d), an employee may request leave for the purpose of participating in active duty for training and shall be entitled to return to his position "with such

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<sup>2/</sup> Added by Title IV of the Viet Nam Era Veterans Readjustment Assistance Act of 1974, Public Law 93-508, as amended.

seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purpose," provided that the employee reports for work within the time specified.

The authority for granting periodic step increases for General Schedule employees who occupy permanent positions is found in 5 U.S.C. § 5335 and the implementing regulations issued by the Office of Personnel Management at 5 C.F.R. Part 531, Subpart D. Pursuant to these provisions, an employee who has not reached the maximum rate of pay for the grade in which his position is placed may be advanced to the next step if he has performed at an acceptable level of competence and completed the designated waiting period. The waiting period for advancement from step 4 to step 5 is 104 calendar weeks.

A waiting period includes periods of annual, sick or other paid leave. Time in a nonpay status is creditable service if the nonpay status does not exceed a specified number of weeks. In waiting periods for steps 5, 6, and 7, time spent in a nonpay status is ordinarily not creditable service if it is in excess of four workweeks during the waiting period. See 5 C.F.R. § 531.406. However, 5 C.F.R. § 531.406(b)(1) provides a special exception for absences due to military duty. It provides that military service as defined in 5 U.S.C. § 8331(13) is creditable service in the computation of a waiting period if the employee is reemployed within 52 weeks after separation from the service.

Military service is defined in 5 U.S.C. § 8331(13) as: "honorable active service--(A) in the armed forces; (B) in the Regular or Reserve Corps of the Public Health Service after June 30, 1961; or (C) as a commissioned officer of the Environmental Science Services Administration after June 30, 1961." Military service does not include service in the National Guard unless the individual is ordered to active duty in the service of the United States, but no distinction is made between Regular and Reserve service.

The Federal Personnel Manual, issued by the Office of Personnel Management, states that an employee's service is creditable for all periods of continuous paid civilian employment for the Government, including various types of paid leave and, under specified conditions, when an employee is separated or in a nonpay status. The example provided is "all time on active duty with the Armed Forces, when

otherwise creditable service is interrupted \* \* \*." Federal Personnel Manual, chapter 531, paragraph 4-7c.

Our review of the applicable provisions does not substantiate the position that a distinction is made between active duty and active duty for training. The terms used, "all time on active duty," and "honorable active service," are not separated into two categories. We point out that service in the National Guard is specifically excepted from the definition of "military service" unless the active duty is in the service of the United States. Since distinctions were made with regard to different services, it appears that had the intent been to exclude active duty for training as active service, a distinction would have been made between active duty and active duty for training. Also, these definitions are consistent with the definitions used in the statutes applicable to the armed forces, which define active service to include "full-time training duty." 10 U.S.C. § 101(22) and (24), and 37 U.S.C. § 101(18) and (20).

In addition, chapter 353 of the Federal Personnel Manual, which provides guidance for Restoration to Duty, defines military duty in part as follows:

"(4) Military duty means a period of  
(a) active duty in the Armed Forces of the  
United States for service or training \* \* \*"  
FPM Manual, Chapter 353, paragraph 1-5 (a)(4).

Subchapter 6 of chapter 353 discusses the rights of those returning from active duty for training and emphasizes that paragraph 3-1 of the chapter requires the agencies to safeguard the rights of the employees whether they are separated, furloughed or placed on leaves of absence.

Thus, it is our view that a distinction is not made between active duty and active duty for training for purposes of determining whether to grant a within-grade increase. Accordingly, the period during which Mr. Ferguson was serving on military duty in a nonpay status should not be used to delay the granting of the increase.

#### Accrual of Leave

Prior to the time he reported to active duty for training, Mr. Ferguson inquired whether he would accrue annual leave during the period he was in a leave-without-pay status. He was apparently told that he would be accruing leave during this period. Relying upon this advice, he

exhausted his annual leave, which he apparently would not have done if leave were not to accrue during the period he was in a leave-without-pay status.

Contrary to what he had been told, Mr. Ferguson did not accrue leave and the agency reduced his credit for leave earned in accordance with 5 C.F.R. § 630.208(a), which requires the reduction when an employee is in a nonpay status. In May 1984, Mr. Ferguson filed a grievance with the agency. The grievance was denied by the agency on the basis that Mr. Ferguson has not been denied a benefit to which he was rightfully entitled by statute. The agency asks whether the Comptroller General will grant relief and allow Mr. Ferguson to obtain credit of annual leave retroactively for the period during which he was in a nonpay status.

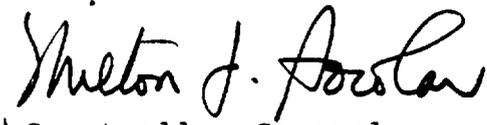
Statutory authority for the right to leave of Federal employees is found in 5 U.S.C. § 6301 et seq. Implementing regulations issued by the Office of Personnel Management are found at 5 C.F.R. Part 630.

Regarding annual and sick leave, 5 C.F.R. § 630.208(a) requires that an agency reduce accumulation of annual and sick leave when the total hours of leave without pay equal the number of hours in the employee's pay period. Unlike the provision concerning periodic step increases, no exception is made for an employee who is in a nonpay status and serving on active military duty. In addition, the guidance provided in the Federal Personnel Manual regarding restoration to duty indicates that although the employee has a right to "vacation" as contained in 38 U.S.C. § 2024(d), the right relates to the scheduling of vacation rather than protection against loss or deduction of annual and sick leave credit while in a nonpay status. See FPM chapter 353, para. 6-6.

Since there is no authority to allow credit for annual and sick leave under these circumstances, the agency acted properly. While it is unfortunate that Mr. Ferguson exhausted his leave, apparently relying on erroneous information provided by the agency, this does not provide a basis on which to allow leave to be credited to him since it is a well-settled rule of law that the Government cannot be bound beyond the actual authority conferred upon its agents by statute or regulation. See Dr. Frank A. Peak, 60 Comp. Gen. 71 (1980).

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It also appears that since Mr. Ferguson exhausted his leave, but did not use unearned leave, no overpayment was made to him and, thus, there is no debt for which relief under 5 U.S.C. § 5584 is appropriate. We find no other basis on which to allow credit for annual leave for the period during which Mr. Ferguson was in a leave-without-pay status. Accordingly, Mr. Ferguson may not be retroactively credited with annual leave for the period during which he was in leave-without-pay status on military duty.

*for*   
Comptroller General  
of the United States