

**DOCUMENT RESUME**

02920 - [A2153258]

[Waiver of Erroneously Granted Home Leave]. B-187396. July 28, 1977. 9 pp.

Decision re: Lamoyne J. DeLille; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Department of Transportation; Federal Aviation Administration; Federal Labor Relations Council; Professional Air Traffic Controllers Association.

Authority: 5 U.S.C. 6301. 5 U.S.C. 5584. 5 U.S.C. 5594 (a). 5 U.S.C. 63, subch. I. 5 U.S.C. 6305, 6305(a). 5-147031 (1962). B-147031 (1961). B-183804 (1975). B-176020 (1972). B-166848 (1969). 5 C.F.R. 630.601 et seq. 5 C.F.R. 630. 4 C.F.R. 91.2. 4 C.F.R. 91.5(c). 52 Comp. Gen. 860. 35 Comp. Gen. 655. 54 Comp. Gen. 747. 54 Comp. Gen. 749.

Both the Federal Labor Relations Council and the Department of Transportation requested a decision on the grievance between the Professional Air Traffic Controllers Organization and the Federal Aviation Administration (FAA) concerning home leave erroneously granted FAA employee transferred from Puerto Rico to Alaska. Agency charged employee's leave account and made salary deduction to recover erroneous leave. Arbitrator found violation of collective bargaining agreement and directed FAA to restore leave and salary. Award was valid and could be implemented. (Author/DJM)

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**DECISION**



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

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**FILE: B-187396**

**DATE: July 28, 1977**

**MATTER OF: Lamoyne J. DeLille - Home Leave**

**DIGEST:** FAA employee who transferred from Puerto Rico to Alaska was erroneously granted home leave. Agency charged employee's leave account with 104 hours annual leave and made deduction from salary for 18 hours of leave without pay. Arbitrator found violation of collective bargaining agreement and directed FAA restore annual leave and reimburse salary. Award may be implemented since employee is entitled to waiver of repayment of 122 hours of home leave erroneously granted and used (5 U.S.C. § 5584).

Both the Federal Labor Relations Council (FLRC) and the Department of Transportation (DOT) have requested a determination by this Office in the matter of a grievance between the Professional Air Traffic Controllers Organization (PATCO), Complainant, and the Federal Aviation Administration (FAA), Department of Transportation, Alaska Region, Respondent (Walsh, Arbitrator), (Grievance No. AAL-75-12(ZAN)2), FLRC No. 76A-99. The case is before the Council on a petition for review of the arbitrator's award filed by the Department of Transportation.

In its letter of January 7, 1977, the Council states, as follows:

"The arbitrator, in the context of the case, determined that the Federal Aviation Administration violated the collective bargaining agreement by improperly directing and informing the grievor when it mistakenly authorized him 160 hours of home

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leave. As a remedy, the arbitrator directed the agency to restore to the grievant both the salary withheld from him and the annual leave charged to him. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violates applicable law and appropriate regulations."

The sole issue before this Office, as stated by the FLRC, is whether the arbitrator's award violates applicable law and appropriate regulations dealing with entitlement to and the granting of home leave.

#### BACKGROUND

The pertinent facts and circumstances giving rise to the claim, as stated in a letter dated August 23, 1976, from the Department of Transportation to FLRC are:

"The facts involved in the arbitration were that Lamoyne J. DeLille (hereafter the grievant) was and is an Air Traffic Control Specialist presently employed by the Federal Aviation Administration at the Anchorage Air Route Traffic Control Center in Anchorage, Alaska. In May, 1975 the grievant requested a transfer to Anchorage where he had been previously employed from San Juan, Puerto Rico. This transfer was approved. Grievant requested 160 hours of biennial or home leave to be spent between his departure from San Juan and his arrival at Anchorage. This request was made of the FAA's Southern Region in Atlanta, Georgia which region has jurisdiction over San Juan. A telegram was sent by the Southern Region to the Alaska Region advising of grievant's request and asking for

approval of the requested leave. Prior to receiving a response, grievant traveled to the headquarters of the Southern Region and was advised by the Chief of the Employment Branch that 'because it is an overseas assignment' he was entitled to home leave. Because he did not receive formal orders from Alaska, the grievant then telephoned the Chief of the Elmendorf RAPCON, the new duty station of the grievant, and inquired of the whereabouts of his travel orders and whether the 160 hours of leave had been approved. He was informed by the Chief that his orders were forthcoming by teletype and the leave was approved. The leave was approved by teletype. Shortly thereafter, grievant's travel orders were issued and they included approval of the requested biennial leave.

"The grievant used 122 of the 160 requested hours and reported to his new duty station. Upon his arrival, he was informed that a mistake had been made and the leave utilized could not be authorized. It was decided that grievant be charged 104 hours of annual leave and 18 hours of leave without pay to repay the 122 hours of leave used."

Mr. DeLille filed a grievance based upon the aforesaid decision of FAA, and the matter was submitted to arbitration. In his opinion the arbitrator concluded that FAA had violated Article 42, sections 2(a) and 2(b) of the collective bargaining agreement between FAA and PATCO. In sections 2(a) and 2(b), FAA reserved to itself the right to direct the work force and retained the right to hire, promote, transfer, and assign its employees. The arbitrator stated that FAA had the obligation to properly direct and inform the grievant and to issue travel

orders to him which conformed to existing law and regulations. Inasmuch as the travel orders which were issued to Mr. DeLille stated, inter alia, "160 hours biennial leave enroute approved," the arbitrator concluded that FAA is bound by the travel orders, including the portion granting leave, particularly since employees of FAA in Anchorage and in the Southern Region advised and directed the grievant down a certain path, namely, that he was entitled to the home leave requested. To remedy the violation the arbitrator directed FAA to repay the 18 hours of salary to the grievant and to restore the 104 hours of annual leave it had taken from him.

OPINION

1. Home Leave

The granting of home leave is governed by 5 U.S.C. § 6305 (1970) which provides, in pertinent part, as follows:

"(a) After 24 months of continuous service outside the United States, an employee may be granted leave of absence, under regulations of the President, at a rate not to exceed 1 week for each 4 months . . . that service without regard to other leave provided by this subchapter. Leave so granted—

"(1) is for use in the United States, or if the employee's place of residence is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico;

"(2) accumulates for future use without regard to the limitation in section 6304(b) of this title; and

"(3) may not be made the basis for terminal leave or for a lump-sum payment."

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The functions of the President under section 6305(a) have been delegated to the United States Civil Service Commission (CSC) by Executive Order 11228, June 14, 1965. Also, the heads of the several departments and agencies are empowered to grant leaves of absence, including home leave, as authorized by Executive Order 10471, July 17, 1953.

The implementing regulations pertaining to home leave promulgated by the CSC, as pertinent to this case and as found in 5 C.F.R. § 630.601, et seq., provide, in essence, that "home leave" means leave authorized by 5 U.S.C. § 6305(a) and earned by service abroad for use in the United States. "Service abroad" means service by an employee at a post of duty outside the United States. An agency may grant home leave only for use in the United States during an employee's period of service abroad or within a reasonable period after his return from service abroad when it is contemplated that he will return to service abroad immediately or on completion of an assignment in the United States.

The applicable definition of the term "United States," as stated in section 6301, title 5, United States Code, when used in a geographical sense, means "the several States and the District of Columbia."

Under the provisions of 5 U.S.C. § 6305, a Federal employee generally is entitled to home leave after serving a tour of duty overseas for the required period. The specific requirements laid down for the granting of home leave are that the employee must have completed a basic service period of 24 continuous months abroad and that it is contemplated that he will serve another tour of duty abroad. 52 Comp. Gen. 860 (1973); 35 id. 655 (1956); B-147031, February 5, 1962, and September 11, 1961.

In the case under consideration, Mr. DeLille had completed 24 months of continuous service in Puerto Rico which satisfied the initial statutory and regulatory requirement for entitlement to home leave. However, he failed to satisfy the second regulatory requirement for such entitlement. Since he transferred from Puerto Rico to Anchorage, Alaska, which is within the "United States" as defined in 5 U.S.C. § 6301, it clearly was not contemplated that Mr. DeLille would return to another assignment abroad as required by 5 C.F.R. § 630.606(c). With the admission

of Alaska as a State of the United States, service in Alaska is no longer considered to be an overseas assignment. Federal Personnel Manual Supplement 990-2, subchapter S6-7a(2), explicitly states that "Home leave is to be provided only when employees are expected to return to overseas assignments." Accordingly, no statutory or regulatory authority existed for FAA to authorize home leave to Mr. DeLille.

As no authority existed for FAA officials to authorize home leave to the claimant, and since the Government is not bound by the unauthorized actions of its agents (54 Comp. Gen. 747, 749 (1975)), it is clear that the Government is not bound by the home leave provision of the travel orders. Hence, the award of the arbitrator cannot be upheld on the ground that the FAA was bound by its issuance of orders granting home leave.

## 2. Waiver Statute

The Waiver Statute, 5 U.S.C. § 5584, provides, in essence, that a claim of the United States against an employee arising out of an erroneous payment of pay or allowances may be waived, in whole or in part, by the Comptroller General of the United States or the head of the agency.

In promulgating standards for waiver of claims as authorized under 5 U.S.C. § 5584, the Comptroller General has provided in 4 C.F.R. § 91.2 as follows:

"(c) 'Pay' as it relates to an employee means salary, wages, pay, compensation, emoluments, and remuneration for services. It includes but is not limited to overtime pay; night, Sunday standby, irregular and hazardous duty differential; pay for Sunday and holiday work; payment for accumulated and accrued leave; and severance pay. It does not include travel and transportation expenses and allowances, and relocation allowances payable under 5 U.S.C. 5724a."

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The definition lists a number of items that are identified as pay and also states that the term "pay" "includes but is not limited to" the specific items listed, including "payment for accumulated and accrued leave."

After a careful review of the foregoing, we have concluded that the term "pay" appearing in section 5584, and the regulations issued pursuant thereto, includes home leave and, consequently, an erroneous grant of home leave is subject to consideration for waiver.

Prior to determining whether the home leave erroneously granted to Mr. DeLille may be waived under 5 U.S.C. § 5584 (1970), it is necessary to distinguish the erroneous grant of home leave herein involved from an erroneous grant of annual leave. In cases involving the erroneous crediting of annual leave, we have held that waiver of annual leave is appropriate when, as a result of a later adjustment to an employee's leave account, it is shown that the employee has taken leave in excess of that to which he was entitled, thereby creating a negative balance in his annual leave account. Otherwise, there is no overpayment which may be considered for waiver under the waiver statute since the error is susceptible to correction through reduction of the employee's positive leave balance. Matter of Franklin C. Appleby, B-183804, November 14, 1975; B-176020, August 4, 1972; and B-166848, June 3, 1969.

In the case before us, at the time Mr. DeLille was erroneously authorized the 160 hours of home leave (of which he used 122 hours), he had 104 hours in his annual leave account. Therefore, the question arises as to whether a different rule can be justified for home leave, permitting waiver of the indebtedness where home leave has been erroneously granted even if the employee has outstanding annual leave which could be used to offset all or a portion of the home leave owed.

We are of the opinion that home leave and annual leave are sufficiently different to justify allowing waiver of erroneous home leave even where there is outstanding annual leave which could be charged. Although annual leave and home leave both appear under chapter 63, subchapter I, of title 5, United States Code, 1970, they are separate leave systems authorized under different sections of the subchapter. Each has different requirements for accrual and accumulation. Also, the basic underlying

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purposes behind the granting of home leave and annual leave are different, and they may not be substituted for each other. Further, lump-sum payment for annual leave is permissible while home leave may not be the basis for lump-sum payment or for terminal leave. See Part 630, title 5, Code of Federal Regulations. We believe that these basic differences between annual leave and home leave justify a different rule in the application of the waiver statute where, as here, home leave has been erroneously authorized.

Turning then to the facts of the case before us, overpayments of pay or allowances arising out of administrative errors may be waived by this Office if collection "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a) (1970). The regulations implementing this statutory provision state, in pertinent part at 4 C.F.R. § 91.5(c) (1974), as follows:

" \* \* \* Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any other person having an interest in obtaining a waiver of the claim. \* \* \*"

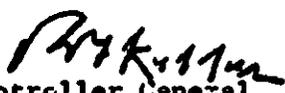
In view of the circumstances involved in this claim, it is clear that the grant of home leave to Mr. DeLille occurred through administrative error, and we find no indication of fraud, misrepresentation, fault or lack of good faith on the part of Mr. DeLille. Accordingly, we hereby waive the indebtedness created by the unauthorized grant of home leave and use thereof by Mr. DeLille.

Moreover, in further support of the legality of the arbitrator's award, 5 C.F.R. § 630.606(e)(1) provides that, where an employee is indebted for the home leave used by him when he fails to return to service abroad after the period of home leave, a refund of this indebtedness is not required when the employee, as in the case of Mr. DeLille, has completed not less than 6 month's service in an assignment in the United States following the period of home leave.

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CONCLUSION

In summary, although we disagree with the reasoning used by the arbitrator, we find that the arbitrator's award is valid under applicable laws and regulations and may be implemented on the basis of this decision. Accordingly, Mr. DeLille is entitled to waiver of repayment of the 122 hours of home leave erroneously granted to him and used by him. Further, he is entitled to reimbursement of an amount equal to the 18 hours charged to him as leave without pay and deducted from his salary and to restoration to his annual leave account of the 104 hours of annual leave charged thereto.

  
Deputy Comptroller General  
of the United States