

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

60153

FILE: B-183804

DATE: NOV 14 1975

97745

MATTER OF:

Franklin C. Appleby--Leave without Pay: Waiver
of Erroneous Payment

DIGEST:

Employee seeks waiver of overpayment of pay resulting from erroneous crediting of leave account which was result of administrative error by employee's supervisor without fraud, misrepresentation, or lack of good faith, on part of employee. Supervisor directed employee to take leave and employee did not request leave for time in question. Overpayments of pay resulting from improper directive to take excessive leave are waived and any amounts repaid by employee may be refunded. See 4 C. F. R. 92.5.

This action is a response to an appeal by Mr. Franklin C. Appleby concerning his claim for payment for 152 hours of leave without pay charged to him during May and June 1973. Claimant requests reconsideration of our Transportation and Claims Division settlement dated April 3, 1975, which disallowed his claim for the reason that the leave taken was in excess of the leave entitlement limits specified in his contract and, therefore, was improperly taken.

The record shows that Mr. Appleby entered into a contract to perform the duties of janitor (trades helper) at the Tyndall Air Force Base Elementary School, Panama City, Florida, a so-called "section 6 school," created under authority of section 6 of Public Law 81-874, 64 Stat. 1100, 20 U. S. C. § 241. The contract covered the period of July 1, 1972, through June 30, 1973, for a total of 260 days, 240 of which were designated as workdays, with the balance as nonworkdays to allow for school holidays and leave for other than sick or emergency purposes. The contract also expressly provided for 12 days of leave for sick or emergency purposes, the total days leave taken not to exceed 19 days for these purposes during the contract period, thereby allowing for a carryover of a maximum of 7 days of such leave from any prior years. The contract provided for an annual salary of \$6,739.20.

Mr. Appleby and 15 other school employees were directed by his supervisor to take 20 days leave beginning in April 1973, and was told by his supervisor that this leave was owed to him as vacation leave with pay. Mr. Appleby took the leave as directed, but

B-183804

subsequently it was later determined to have been excessive since the leave provisions of the employee's contract did not provide for such leave and the leave provided for by the contract had been exhausted prior to the supervisor's directive.

The contract leave entitlement limits were consistent with the applicable regulation, Air Force Supplement to Basic Federal Personnel Manual (Increment 13), April 13, 1973, Subchapter 7 (Section 6 Dependents School Personnel). Paragraph 7-11 of this regulation provides, in pertinent part, as follows:

"7-11. LEAVE BENEFITS. The amount and type of Section 6 leave that may be earned each 'leave year' by Section 6 employees must not exceed the amount which may be earned within the same time period by similar employees who are subject to the Annual and Sick Leave provisions of 5 USC Chapter 63, or who are P.L. 86-91 teachers subject to Subchapter 6, Air Force Supplement to Basic FPM Chapter 302. To avoid confusion with other established leave systems, the terms 'annual leave' and 'sick leave' must not be used for leave for Section 6 employees. The appropriately established leave should be identified by distinctive terms, such as Section 6 vacation leave, Section 6 illness leave, or Section 6 teachers leave for sick and emergency purposes. The conditions of employment should clearly specify leave entitlements and conditions for use."

It is clear from the record that Mr. Appleby detrimentally relied upon the erroneous directive of his supervisor, who apparently acted upon the mistaken belief that his employee was entitled to additional leave, a belief which had no basis in fact or in law. The later administrative determination that Mr. Appleby was not entitled to the 19 days of leave in question and the substitution of a charge to leave without pay for the period in question appears to be proper.

However, even though Mr. Appleby has not specifically raised the point, the waiver provisions of 5 U.S.C. § 5584 (Supp. III, 1973), should be considered. The statute provides in pertinent part as follows:

"§ 5584. Claims for overpayment of pay and allowances, other than travel and transportation expenses and allowances and relocation expenses.

"(a) A claim of the United States against a person arising out of an erroneous payment of pay, or allowances, other than travel and transportation expenses and allowances and relocation expenses payable under section 5724a of this title on or after July 1, 1960, to an employee of an executive 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 by--

"(1) the Comptroller General of the United States; or

"(2) the head of an executive agency when--

"(A) the claim is in an amount aggregating not more than \$500;

"(B) the claim is not the subject of an exception made by the Comptroller General in the account of any accountable official; and

"(C) the waiver is made in accordance with standards which the Comptroller General shall prescribe.

* * * * *

"(c) A person who has repaid to the United States all or part of the amount of a claim, with respect to which a waiver is granted under this section, is entitled, to the extent of the waiver, to refund, by the employing agency at the time of the erroneous payment, of the amount repaid to the United States, if he applies to that employing agency for that refund within two years following the effective date of the waiver. The employing agency shall pay that refund in accordance with this section."

B-183804

Under the statute, the Comptroller General has authority to initiate waiver action.

The standards for waiver of an erroneous payment of pay under the waiver statute are published at 4 C. F. R. 91-93. Section 91.2(c) thereof defines the word "pay" 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." (Underscoring supplied.)

We have previously held that waiver of an erroneous payment for accumulated and accrued 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 an overpayment which may be subject to waiver. Overpayments of pay 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 interest of the United States." 5 U. S. C. § 5584(a) (1970). The regulations implementing this provision state in part (4 C. F. R. 91.5(c) (1974)):

"* * * 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 set forth above, it seems clear that the supervisor's directive to take leave was improper and constituted administrative error which caused the overpayment to occur, and we do not believe Mr. Appleby can be said to have been at fault in the matter. Accordingly, on the basis of the foregoing we hereby waive

B-183804

the indebtedness created by the excess leave and a refund may be made to Mr. Appleby of the amount withheld from monies otherwise due him for the charge of 19 days of leave without pay. Mr. Appleby should make application for such refund to the Department of the Air Force within 2 years of the date of this decision in accordance with 4 C. F. R. 92. 5.

Finally, with regard to the other 15 employees similarly situated, we believe that they should be similarly treated. Any indebtedness created by the excess leave applicable to them is also waived and refunds may be made of the amounts withheld from their pay.

MERSON WOODLEE
Acting Comptroller General
of the United States