

**DECISION**

95344  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548  
58546

FILE: B-180436

DATE: FEB 13 1975

MATTER OF: Jack D. Ellison - Substitution of sick leave for leave without pay taken before retirement

- DIGEST:
1. Act of October 24, 1973, Public Law 93-136, which liberalized eligibility for cost-of-living increases in civil service retirement annuities, does not permit retirees who applied for disability retirement and took leave without pay in order to qualify for cost-of-living increase under prior law to replace such leave without pay with unused sick leave used in computation of annuities.
  2. Title 5, United States Code, provides for granting of sick leave to employees on the rolls and not to former employees separated by retirement, resignation, or otherwise, and separated employees may not be restored to rolls for purpose of taking sick leave unless there was bona fide error or violation of valid regulation in fixing separation date.

The San Francisco Region of the United States Civil Service Commission (CSC) requested our Office to determine whether Mr. Jack D. Ellison, a retired Government employee, may retroactively substitute 504 hours of sick leave in place of leave without pay taken prior to his separation. The question arises as a result of the enactment of the Act of October 24, 1973, Public Law 93-136, 87 Stat. 490, 5 U.S.C. §8340(c)(1) (Supp. III, 1973).

Mr. Ellison, a civilian employee of the Department of the Air Force, applied for disability retirement in early June 1973. He had accumulated 504 hours of sick leave effective June 30, 1973, and at that time elected to go on leave-without-pay status in order to be eligible for the 6.1 percent cost-of-living increase in annuities beginning July 1, 1973. Approval of the claim for disability retirement was received November 5, 1973, and he was retired in accordance with the applicable rules effective July 1, 1973.

Mr. Ellison now asks if his accumulated sick leave may be retroactively substituted for the leave without pay which he had to request to receive the July 1, 1973, cost-of-living increase

and also receive the benefits of Public Law 93-136. He currently receives the 6.1 percent increase in retirement annuity which was effective July 1, 1973, and his unused sick leave has been credited to his length of service for annuity computation purposes. The ultimate question presented is whether an employee may substitute unused sick leave for previously requested leave without pay and still receive the benefits of the 6.1 percent cost-of-living increase as a result of the enactment of Public Law 93-136.

Public Law 93-136 was enacted to liberalize eligibility for cost-of-living increases in civil service retirement annuities. Prior to its enactment, annuitants whose annuities commenced after the effective date of an increase were not entitled to the increase while those whose annuities commenced on the date of the increase were eligible. Section 8340(c)(1) of title 5, United States Code (Supp. III, 1973), as amended by Public Law 93-136 provides:

"(c) Eligibility for an annuity increase under this section is governed by the commencing date of each annuity payable from the Fund as of the effective date of an increase, except as follows:

"(1) An annuity (except a deferred annuity under section 8338 of this title or any other provision of law) which--

"(A) is payable from the Fund to an employee or Member who retires, or to the widow or widower of a deceased employee or Member; and

"(B) has a commencing date after the effective date of the then last preceding annuity increase under subsection (b) of this section;

shall not be less than the annuity which would have been payable if the commencing date of such annuity had been the effective date of the then last preceding annuity increase under subsection (b) of this section. In the administration of this paragraph, an employee or a deceased employee shall be deemed, for the purposes of section 8339(n) of this title, to have to his credit, on the effective date of the then

last preceding annuity increase under subsection (b) of this section, a number of days of unused sick leave equal to the number of days of unused sick leave to his credit on the date of his separation from the service." (Emphasis added.)

The plain language of the law requires inclusion of sick leave credit for computing length of service under 5 U.S.C. 8339 (Supp. III, 1973) for employees retiring after the date of a cost-of-living increase. However, there is nothing in Public Law 93-136 or its legislative history indicating an intent to provide for substitution of sick leave for leave without pay taken by an employee for purposes of retiring with entitlement to a cost-of-living increase under prior law.

Since Mr. Ellison's accrued sick leave was credited in computing length of service for his annuity, as noted above, the CSC regulation in section 639.407 of title 5, Code of Federal Regulations (1974), concerning sick leave used in computation of annuity is applicable. That regulation provides:

"Sick leave which is used in the computation of annuity for an employee shall be charged against his sick leave account and may not thereafter be used, transferred, or recredited."

As may be seen, the regulation explicitly prohibits the proposed retroactive substitution of sick leave for leave without pay or any other kind of leave.

We have previously noted in decision B-156534, April 26, 1965, that:

"[t]he law provides for the granting of sick leave in kind only, that is, permission to be absent from duty because of incapacity without loss of pay. It may be granted only to employees on the rolls of a department and it may not be granted former employees who have been separated from the service by retirement, resignation or otherwise. Further, the law does not provide for a lump-sum payment, upon separation, for sick leave as it does for annual leave."

B-180436

Furthermore, we have held that there is no authority for reimbursing annuitants for sick leave forfeited at retirement either by lump-sum payment or restoration to the rolls for the purpose of granting sick leave instead of leave without pay in the absence of a bona fide error or violation of a valid regulation. B-167973, October 13, 1969; B-160754, April 19, 1967.

For the reasons stated above no authority exists for substitution of sick leave for the leave without pay which Mr. Ellison took prior to retirement.

R. S. MILLER

Acting

Comptroller General  
of the United States