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DECISION



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

FILE: B-191495

DATE: April 10, 1978

MATTER OF: Francis S. Stein - Disability Retirement -
Reemployment

DIGEST: Employee retired on disability. He recovered and was reemployed. He elected part-time duty, instead of full-time with time off charged to sick leave or leave without pay, on the alleged advice of a personnel specialist that his retirement annuity would be computed as though he were on full-time. We find no improper personnel action since either full-time or part-time duty would have been proper within agency discretion. Alleged erroneous advice does not bind Government. Retroactive change to full-time duty may not be made.

The Assistant Secretary for Administration and Management, Department of Labor, requests a decision on whether the agency can treat the reemployment of Mr. Francis S. Stein, as set forth below, as an unjustified or unwarranted personnel action, and thus permit a retroactive change in his appointment from part-time to full-time.

The chronology of facts submitted by the agency reads as follows:

"May 5, 1972.

"Mr. Stein retired on disability from his position with the Bureau of International Labor Affairs, Department of Labor as an International Economist, GS-110-15, Step 5 at the rate of \$28,995.00 per annum.

"May 7, 1973.

"Mr. Stein was reinstated on a career appointment as he had recovered from his disability. He was placed in his position as International Economist, GS-15, Step 5 at the rate of \$30,486.00 per annum. In his letter to Mr. Taylor, Mr. Stein indicates that, at that time, he inquired of the Personnel

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Management Specialist as to whether or not he should be placed on sick leave for those hours during which he was not able to perform a full day's work. He alleges that a member of the Personnel Office told him that it would be better for him to assume his duties on a part-time basis, that he would receive full credit for retirement purposes for this particular service time, and also that his high three salary would be computed upon the stated full-time per annum rate and not on the part-time basis.

"May 11, 1973.

"On this date Mr. Stein assumed a part-time tour of duty to work 48 hours per pay period.

"August 16, 1973.

"An SF-50 in Mr. Stein's Official Personnel Folder shows that on this date he began working 64 hours per pay period.

"October 3, 1973.

"Mr. Stein assumed his duties on a full-time basis and an SF-50 was cut to show a pay adjustment to full-time.

"August 7, 1974.

"Mr. Stein again retired on disability due to a recurrence of his previous illness.

"August 30, 1977.

"On this date, Mr. Stein addressed a letter to Mr. James Taylor, Bureau of International Labor Affairs (ILAB), articulating his concern for the computation of his present annuity. This letter was forwarded to Mr. D. E. Lemmon September 29, 1977, by Mr. Taylor. In that letter, Mr. Stein expresses his belief that, had he been advanced

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sick leave when he was restored to duty on May 7, 1973, he would now be receiving \$1,500.00 per year more in his annuity, as his high three salary would have been based on the per-annum rate for full-time rather than the part-time rate. He states in that letter that at the time he discovered this discrepancy he was quite ill, and it did not occur to him to seek redress, but that, at this time, he is beset by financial reverses which compel him to attempt to correct this error.

"The Personnel Management Specialist whom Mr. Stein consulted when he was reinstated has no recollection of the meeting in which it is contended that she gave the advice. As we have no evidence to refute Mr. Stein's allegations on this point, it would appear that nothing is to be gained by insisting that this advice was not given. The advice, as it was understood, would have been erroneous and would have misapplied FPM Supplement 831, Sub-Chapter 14-3 (d).

"FPM 630, Department of Labor Supplement Sub-Chapter 4 points out that advance sick leave may be granted when an employee is temporarily able to return to duty for partial days only or for intermittent periods only. However, the Department of Labor Supplement Sub-Chapter also states that 'since advances of sick leave are made only when definitely advantageous to the Department, no advances of sick leave should be made to employees for whom future accrual of sick leave is doubtful.' "

The agency states that had Mr. Stein requested an advance of sick leave at the time in question his request would have been granted. At the present time, however, the agency would not, in the absence of our advice to the contrary, consider retroactively advancing sick leave since, as it developed in Mr. Stein's case after May 1973, there is no reasonable expectation that the employee will be able to earn it back. Instead, if we approve, the agency would give Mr. Stein a retroactive grant of leave without pay or leave to his credit at that time.

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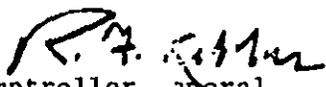
The agency urges favorable consideration of its request in the light of our decision in Matter of Ruth Wilson, 55 Comp. Gen. 836 (1976). In that case, the agency had required the employee to make an election between being promoted temporarily with no entitlement to per diem and receiving per diem without promotion while at a temporary duty station. The employee elected to receive per diem in lieu of a temporary promotion. We held that, although a temporary promotion was discretionary, the agency had no right to require employee to make such a choice. We concluded that, since the employee would have been promoted but for the improper action, an unjustified or unwarranted personnel action had occurred, and we approved a retroactive promotion with backpay for the period of the detail.

In the present case, we appreciate the agency's concern and its request for an urgent resolution since we understand Mr. Stein is seriously ill. However, we do not believe that the proposed retroactive action is proper under the facts of this case.

In Ruth Wilson, *supra*, the agency, in exercising its discretion as to a temporary promotion, improperly gave the employee a choice between promotion or per diem in lieu of subsistence in the mistaken conception that a temporary promotion effected a change of station. Mr. Stein was given no such improper choice. Although the advice he allegedly received may have been erroneous, each of the alternatives, i.e., a return to either full-time work or part-time work, would have been a proper exercise of the agency's discretion in effecting Mr. Stein's reinstatement after his disability retirement. In the circumstances we fail to see that an unjustified or unwarranted personnel action occurred.

With respect to the alleged misinformation Mr. Stein received, the well-established rule of law is that the Government can neither be bound nor estopped by the erroneous or unauthorized acts of its agents. See B-176580, August 7, 1974; B-181311, August 21, 1974, and decisions cited therein.

Accordingly, Mr. Stein may not be given a retroactive correction showing his return to duty in May 1973 as having been full-time employment.


Comptroller General
of the United States