

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

PLM-11

10,807

FILE: B-193648

DATE: July 19, 1979

MATTER OF: Mr. Bartley T. Stokes

DIGEST: A Federal employee applied for disability retirement, waived military retired pay to increase his Civil Service annuity and spouse's survivor annuity to be effective when retirement is granted, but then went on extended sick leave and died in that status. While the agency has discretionary authority to place <sup>the employee</sup> him in a leave-without-pay (LWOP) status because of retirement counseling errors or ~~his~~ <sup>the employee's</sup> misunderstanding, <sup>in this case, however,</sup> there is nothing of record to show such counseling error or that <sup>the employee</sup> he mis-  
understood that a sick leave status was not retirement, <sup>therefore,</sup> it would be improper to retroactively substitute LWOP for sick leave. B-190204, January 26, 1978, distinguished.

Substitution of

The Navy has asked whether it may retroactively substitute <sup>LWOP</sup> leave without pay (LWOP) for sick leave for a period ~~just~~ <sup>newly</sup> prior to the death of <sup>an</sup> employee so that his military retired pay waiver <sup>may</sup> be given effect and his military service combined with civilian service to increase his spouse's survivor annuity.

Although the matter of substituting LWOP for sick leave charged (retroactively decreasing the deceased employee's pay entitlement) is within our jurisdiction, the Office of Personnel Management must determine how to compute the survivor annuity. 5 U.S.C. 8347. We have previously answered questions relating to leave charges and pay entitlement which have been asked primarily because of the effect on Civil Service Retirement benefits. Apparently the Civil Service Commission (now Office of Personnel Management) has paid benefits consistent with those decisions. While we cannot direct payment or withholding of payments from the Civil

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Service Retirement Fund, we have considered the leave substitution question and for the reasons given below have determined that substitution should not be allowed in this case.

Mr. Bartley Stokes was a civilian employee of the Federal Government from February 12, 1954, to March 25, 1977, the date of his death. Prior to that employment, he performed active duty in the United States Navy, for which he received retired pay.

On August 19, 1976, Mr. Stokes executed an application for disability retirement under the Civil Service retirement system and elected to provide his spouse with a survivor annuity. On September 7, 1976, he signed a letter to the Commanding Officer, Navy Finance Center, in which he stated that he wanted to waive his military retired pay "effective the day after my civilian disability retirement is approved by the Civil Service Commission, to be combined with my Civil Service retirement." On September 10, 1976, his retirement application was forwarded by his agency to the Civil Service Commission and he went on extended sick leave. The record shows that he had in excess of 41 years of active Federal service and approximately 1 year of sick leave to his credit (to terminate on September 29, 1977) at that time.

By document dated October 1, 1976, the Civil Service Commission, in response to the employee's disability retirement application, advised the Accounting Support Center, Naval Air Station, that while the employee's disability retirement had been approved, his final SF 2806 "Individual Retirement Record" could not be forwarded for final action because he was still on the payroll of his agency in a sick leave status, confirming the September 29, 1977 termination date. Mr. Stokes died on March 25, 1977, while in that status.

Mr. Stokes had not elected coverage under the Survivor Benefit Plan, 10 U.S.C. 1447-1455, to provide an annuity for his wife based on his military retired pay. As a result, the only survivor annuity available to his spouse

was that provided under the Civil Service system based on his civilian service. Since Mr. Stokes was not in a Civil Service retirement status at the time of his death but was on his agency's payroll, he was not able to combine his military service with his Civil Service time for the purpose of establishing an annuity at the higher rate. Thus, Civil Service survivor annuity for his spouse is not for computation on the basis of the higher rate.

Therefore, the agency asks whether it may retroactively substitute leave without pay for sick leave in Mr. Stokes' case and the employee's surviving spouse reimburse the agency for all sick leave payments made. The basis for that request is that while it appears that the employee completed all paperwork necessary for retirement and to combine both his military and civilian service for annuity purposes, it is claimed that there is an aura of uncertainty as to whether he fully understood that he was still on the Civil Service rolls as a full-time employee while in a sick leave status. In support of that request, the submission cites our decision B-190204, January 26, 1978.

In that decision, we considered the case of an employee on sick leave who, because of the critical nature of his illness, was unable to conduct his own affairs. He appointed his spouse to act on his behalf in the matter of his retirement. His spouse apparently received counseling and sought immediate disability retirement for her husband. Since the employee was receiving military retired pay, in order to maximize his retirement annuity and his spouse's survivor annuity he had to be on the Civil Service retirement rolls prior to his death. In order to accomplish this, his wife executed both his application for immediate disability retirement and a waiver of his military retired pay, delivering them to the agency. Apparently due to the anxieties of the moment, she failed to request a change in his status from sick leave to leave without pay and the failure to do so went unnoticed. The employee died shortly thereafter while in a sick leave status.

Based on the spouse's statement regarding her understanding of information given, the critical nature of her husband's illness, and the evidence of record corroborating the probable misunderstanding and error, we held that there was sufficient evidence to show that it was her intention to effect his immediate retirement thereby maximizing his annuity and her survivor annuity. As a result, we concluded that it was appropriate for the agency to exercise their discretion and retroactively substitute leave without pay for sick leave in that case.

In general, the exercise of discretion in the granting of leave to an employee (annual, sick or leave without pay), within the limitation of applicable laws and regulations, is an administrative matter. When leave has been properly granted and compensation paid therefor by the agency, we are, without jurisdiction to either review or direct any change in administrative records in the absence of any abuse of that authority. See 36 Comp. Gen. 183 (1956). Thus, where the administrative office changes the record to show an employee in a leave-without-pay status for all or any part of periods previously charged to annual or sick leave where the evidence of record shows that the original leave status to be in error, even after the employee's separation, by death or otherwise, we would not be required to object. See 24 Comp. Gen. 143 (1944). It is our view that the underlying basis for the exercise of sound administrative discretion in this area must be the existence of evidence of record which points up misunderstandings or mistakes, as was the case in B-190204, January 26, 1978.

The regulations governing Civil Service retirement are set forth in the Federal Personnel Manual (FPM) Supplement 831-1, Subchapter S10 of which applies to disability retirement. Paragraph S10-5 thereof, which discusses agency responsibility for counseling in disability retirement cases, provides in part:

"a. In general. Generally, an employee who has a large accumulation of sick leave should defer filing an application for disability retirement until his or her leave

reaches a balance of approximately 60 days. The agency should give every assistance to the employee in completing the application by helping him or her to select the type of annuity best suited to the circumstances \* \* \*. If the employee is unable to work, the agency should carry him or her in a leave status (with or without pay) until notified by the Civil Service Commission of its action on the application."

In conjunction with the foregoing, paragraph S3-5 provides in part:

"f. Waiver of military retired pay.

(1) An employee or employee-annuitant who is receiving military retired pay which bars credit for military service \* \* \* may elect to waive the retired pay and have military service added to civilian service. \* \* \*

\* \* \* \* \*

"(4) In certain disability claims (where the nature of the disability appears to be very serious and the applicant is in receipt of military retired pay), the following procedure is suggested in order to ensure the maximum annuity benefits to the employee and spouse. Where unused sick leave is involved, and the applicant meets the age and service requirements for disability annuity, he or she may be placed on LWOP instead of sick-leave-with-pay status, and request a waiver of military retired pay. In the event of the applicant's death while the disability claim is pending, he or she can be considered to have completed a valid waiver of military retired pay after the commencing date of annuity because the annuity would commence the day following the last day in pay status.

In this way, credit for all honorable, active periods of military service will be included in computing both the annuity and the survivor benefits."

Paragraph S3-7g(3) of the same regulation provides in part:

"a. General rule. The services of an employee who \* \* \* dies leaving a widow or widower entitled to survivor annuity is increased by the days of unused sick leave to his or her credit under a formal leave system. \* \* \*

"g.(3) \* \* \* In general, it is more advantageous to the employee to be separated as of the date sick leave expires than to be separated upon approval of the retirement application and receive retirement credit for his unused sick leave."

Under these regulations, while an agency is required to counsel an employee on retirement matters, including advising him as to the ramifications of taking certain courses of action, there is no requirement that the employee must follow the recommendations of the agency, since the choice is his to make. In other words, while the agency is to counsel the employee, it is the employee's responsibility to elect that course of action which he feels is in his best interest. The fact that subsequent events establish that the employee erred in his choice, would not serve as a basis for an administrative change in his record.

In the present case, the employee acted for himself prior to actually going on sick leave on September 10, 1976. He executed his disability retirement application on August 19, 1976, as well as a waiver of his military retired pay on September 7, presumably based on retirement information administratively provided. When his

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disability retirement was approved he did not retire but continued on sick leave. Considering the fact that he had more than 41 years of creditable service and a year of sick leave to his credit, it may have appeared to him that receiving full pay in a sick leave status was more advantageous than receiving sick leave credit for retirement computation purposes. It is also noted that he had used more than 6 months of that leave before he died.

Unlike the situation in B-190204, January 26, 1978, no substantial evidence has been presented to show that the employee received incomplete or erroneous retirement counseling. Also, no evidence has been presented to show that during any of the period from August 1976 to his death in March 1977 Mr. Stokes intended to receive anything other than that which he was receiving or that he misunderstood that he was not retired while in a sick leave status. Therefore, based on the record before us, it is our view that it would be an abuse of discretion for the agency to retroactively substitute leave without pay for sick leave in this case.

*R. F. Ketter.*  
Deputy Comptroller General  
of the United States