



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Chris Roggeron - Payment by Agency of Employee's  
Share of Retirement Contribution

File: B-226425

Date: January 4, 1988

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### DIGEST

An employee's change in appointment from a reemployed annuitant to a permanent Senior Executive Service position was incorrectly implemented by his employing agency, and no deduction was made from his salary for his contribution into the retirement fund for nearly 4 years. The agency is advised that there is no authority for the agency to pay the employee's share of his retirement contribution so that he may receive additional service credit. Congress has provided the employee with a solution in 5 U.S.C. § 8344(a)(B) (1982), which provides that he can attain additional service credit by voluntarily making a deposit in the retirement fund. See Sakran v. United States, 176 Ct. Cl. 831 (1966).

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### DECISION

The Director, Financial and Resource Management Services, U.S. Equal Employment Opportunity Commission (EEOC), requests an advance decision concerning the payment by the agency of an employee's share of his retirement contributions where the agency failed to properly convert his appointment from reemployed annuitant to a permanent appointment. The EEOC is advised that there is no authority for such a payment.

### BACKGROUND

Mr. Chris Roggeron had previously retired on discontinued service when he was employed by EEOC in various positions on a temporary basis as a reemployed annuitant from November 1, 1980 to June 25, 1983. Mr. Roggeron's salary was properly reduced by his annuity, and since he was a reemployed annuitant, deductions from his salary for the Civil Service Retirement Fund were not withheld. 5 U.S.C. § 8334 (1982).

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On June 26, 1983, Mr. Roggerson was appointed to his present position of District Director for EEOC's San Francisco Office. This change in appointment necessitated Mr. Roggerson's conversion from a temporary status to a career Senior Executive Service status. At this time, EEOC should have notified the Office of Personnel Management (OPM) of the change in his status, and the need to stop his annuity payments so that he would receive his full salary without an annuity deduction. However, the EEOC failed to notify OPM of the change in Mr. Roggerson's appointment. Thus, Mr. Roggerson continued to receive annuity payments and a reduced salary and the agency failed to deduct 7 percent of his salary for payment into the Civil Service Retirement Fund or to credit his service towards retirement.

In December 1986, Mr. Roggerson was advised by EEOC of the error in his appointment, and he was told that EEOC could rectify the error by retroactively appointing him to his current position. The corrective action, if implemented, would require that the EEOC reimburse Mr. Roggerson the amount by which his salary had been reduced by the annuity deduction, approximately \$86,136. Mr. Roggerson, in turn, would be indebted to OPM for the \$86,136 since this amount would represent an overpayment of his annuity. Under this plan, both EEOC and Mr. Roggerson would be obligated to pay their share (7 percent) into the Civil Service Retirement Fund, and he would then be able to count this time as creditable service for retirement.

The EEOC contacted OPM's Office of Retirement Programs and was advised that another solution was available so that Mr. Roggerson could be credited with his past service in his current position. The EEOC could prospectively appoint Mr. Roggerson to his position at full salary, and OPM, upon notification, would discontinue payment of his retirement annuity. His previous service from June 26, 1983, to the day of his conversion would be considered temporary service wherein the deduction for the retirement fund was not required. However, in order for Mr. Roggerson to receive creditable service for this period it would be necessary for him to deposit approximately \$18,125 plus interest into the retirement fund.

We have been advised that Mr. Roggerson concurred in this latter arrangement, and he was appointed prospectively on March 1, 1987. The OPM is no longer paying him a retirement annuity.

The EEOC requests approval to pay Mr. Roggerson's share of his retirement contribution of \$18,125, plus interest. The EEOC believes that it committed an administrative error by not properly appointing Mr. Roggerson in June 1983, and the agency argues the error should not result in a loss of future benefits that he is entitled to as a result of his additional service. The EEOC also believes that a failure to grant approval will lead Mr. Roggerson to file suit against the Government and that he would be successful in court and be granted a retroactive appointment back to June 26, 1983.

#### OPINION

This Office is unaware of any statutory authority that would allow the EEOC to expend its appropriated funds on behalf of Mr. Roggerson by paying his share of retirement contributions. The only authority that requires an agency to contribute an amount equal to the employee's contribution to the retirement fund is found in 5 U.S.C. § 8334 (1982). That section prescribes the rules governing deductions, contributions, and deposits, and applies to those employees as defined in 5 U.S.C. § 8331 (1982).

Mr. Roggerson, who was retired under a discontinued service retirement, became a reemployed annuitant on November 1, 1980. As a reemployed annuitant, Mr. Roggerson had no deductions for the retirement fund withheld from his pay, and EEOC correctly reduced his salary by the amount of his annuity as prescribed by 5 U.S.C. § 8344(a). It is true, as EEOC states, that payment of Mr. Roggerson's annuity should have terminated on June 26, 1983, when he was appointed to a permanent SES position. See 5 U.S.C. § 8344(b) (1982); Federal Personnel Manual Supplement, S15-6 (Sept. 21, 1981). However, 5 U.S.C. § 8344(a) provides a solution to Mr. Roggerson's dilemma since that provision states, in pertinent part that:

"\* \* \* If the described employment of the annuitant continues for at least 5 years, or the equivalent of 5 years in the case of part-time employment, he may elect \* \* \* to deposit in the Fund (to the extent deposits or deductions have not otherwise been made) an amount computed under section 8334(c) of this title covering that employment and have his rights redetermined under this subchapter. \* \* \*"

Since Mr. Roggeron has been employed as a reemployed annuitant for more than 5 years, he would be entitled by statute to deposit money into the retirement fund and have his service time credited. This was the solution suggested by OPM, and we concur since we fail to see where Mr. Roggeron would benefit greatly by a retroactive appointment. He would have to pay interest on this deposit, but we note that he received the full amount of pay he was entitled to at that time (partial salary plus annuity), and a retroactive adjustment would require a payment into the retirement fund from monies he has already received.

As to EEOC's concern about a possible court suit, we cannot, of course, predict the outcome; however, there is precedent in this area. In Sakran v. United States, 176 Ct. Cl. 831 (1966), a case involving similar circumstances to Mr. Roggeron's, a retired Federal employee was reemployed but he continued to be paid an annuity and no retirement contributions were made for a 5-year period. When the employee retired a second time, he contended that he was entitled to a full recomputed annuity without deduction for the unpaid deposit and that his employing agency should have made the deposits to his retirement annuity account that would have otherwise been deducted from his salary. The court in Sakran held in 176 Ct. Cl. at 836 that:

"The Civil Service retirement system requires joint deposits by employee and employer in order to build up over the years a fund out of which the annuities may be paid. Congress recognized that as a result of various contingencies that would arise, there would be employment periods

during which no deductions would be made from an employee's salary for deposit in the retirement fund. Consequently, Congress declared that if the employee wishes to get the benefit of a full annuity, he must make the specified contributions."

The court also went on to say:

"We find nothing in the court's order<sup>1/</sup> which directed that his conversion to permanent status be made retroactive and that the Government make the specified deposits to the retirement fund in order to avoid the reduction in his annuity. Plaintiff sought no such relief in his suit in the district court. Had he done so, we are confident that the court would have rejected the plea on the ground that it is precluded by the congressional mandate."

We believe that Mr. Roggerson is also subject to the congressional mandate prescribed in 5 U.S.C. § 8344(a)(B), supra, and that he, and not his agency, must make a deposit into the retirement fund in order for him to receive creditable service.

Accordingly, Mr. Roggerson must pay the prescribed amount into the retirement fund if he wishes to receive creditable service. The EEOC's request to deposit that amount for him is denied.

*for*   
Comptroller General  
of the United States

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<sup>1/</sup> The plaintiff had received a district court order remanding his case to the then-Civil Service Commission for certain actions.