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DECISION



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

FILE: D-208406

DATE: October 6, 1982

MATTER OF: Merit Systems Protection Board -
Administrative Leave - Partial Shutdown

DIGEST: The Merit Systems Protection Board asks whether administrative leave may be granted retroactively to employees who were ordered not to report for work during a brief partial shutdown of the agency. The employees were placed on half-time, half-pay status in order to forestall a funding gap which would have necessitated a full closedown. In its discretion, the Board has the authority to retroactively grant administrative leave with pay to the affected employees to the extent appropriated funds were available and adequate on the dates of the partial shutdown.

Mr. Richard Redenius, the Managing Director, Merit Systems Protection Board (MSPB or Board), has requested a decision as to the authority of MSPB to grant retroactive administrative leave to its employees who were ordered not to report for work during an administratively declared partial shutdown resulting from the Board's efforts to forestall a funding gap. For the reasons stated herein, we hold that the Board may grant retroactive administrative leave to its employees for the time in question.

BACKGROUND

On December 15, 1981, the Congress passed a continuing resolution which had the effect of cutting the MSPB's fiscal year 1982 appropriation by 16 percent. This unforeseen budgetary shortfall and the Board's uncertainty as to when or whether needed supplemental appropriations would be passed resulted in a management decision in the summer of 1982 to stretch fiscal year 1982 appropriations as far as possible by initiating a partial shutdown. The Board viewed the partial shutdown as an alternative to the potential of

a full closedown in early August 1982 for the balance of fiscal year 1982. In order to forestall such a full closedown, the Board initiated a partial shutdown on July 6, 1982. All employees, with the exception of a small number of essential employees, were placed on half-time, half-pay status for the period from July 6, 1982, through July 14, 1982, with actual time missed ranging from a minimum of 2 days to a maximum of 5 days. On July 10, 1982, the President signed into law the Urgent Supplemental Appropriations Act of 1982, Pub. L. 97-216, 96 Stat. 100, which in Title I, Chapter 4, added \$4,006,000 to the MSPB's appropriations for salaries and expenses, an amount sufficient to fund the Board through fiscal year 1982 at full staff. Since the Congress had passed the bill the previous Thursday, July 15, 1982, and since the Board did not anticipate a veto, the Board called all staff back to full-time work on that date.

The question presented is whether, in view of changed circumstances stemming from enactment of the Urgent Supplemental Appropriations Act, the Board may now utilize funds which it reports were on hand at the time of the partial shutdown to grant retroactive administrative leave with pay to those employees who were ordered not to report to work during the partial shutdown.

OPINION

Neither the Office of Personnel Management nor its predecessor, the Civil Service Commission, has issued any general regulations on the subject of granting excused absences to employees without loss of pay or charge to leave (commonly called "administrative leave"). Further, there is no general statutory authority under which Federal employees may be excused from their official duties without loss of pay or charge to leave. However, excused absences with pay have been authorized in specific situations. For example, section 6326 of Title 5, United States Code, authorizes an absence of up to 3 days for an employee to participate in funeral services of an immediate relative who died as a result of military service in a combat zone.

In addition, over the years it has been recognized that, in the absence of a statute controlling the matter, the head of an agency may in certain situations excuse an employee for brief periods of time without charge to leave or loss of pay. Some of the more common situations in which agencies generally excuse absence without charge to leave are discussed in Federal Personnel Manual (FPM) Supplement 990-2, Book 630, Subchapter S11. See 53 Comp. Gen. 582 (1974).

Additionally, the Federal Personnel Manual states that "[t]he closing of an activity for brief periods is within the administrative authority of an agency." FPM Chapter 610, S3-1(a). Examples of the appropriate use of such authority given by the FPM include (1) when normal operations are interrupted by events beyond the control of management or employees such as emergency conditions; and (2) when managerial reasons require the closing of an establishment or portions thereof for short periods of time.

We recognize, of course, that the MSPB case is not the normal situation. The Board's employees were placed on a partial nonpay status as the result of a considered management decision and not as the result of an uncontrollable interruption of normal operations or a breakdown of machinery or power failure. Nevertheless, we believe the partial closing of the Board's offices in the circumstances described above falls within the scope of the administrative authority of an agency to close an activity or part thereof for brief periods when required for managerial reasons, as described in FPM Chapter 610, S3-1, and in FPM Supplement 990-2, Book 610, S3-1.

We recognize also that this case involves the retroactive granting of administrative leave to a group of employees instead of the usual issue of a prospective grant of administrative leave. Here again, we have permitted retroactive administrative leave in proper cases. See 53 Comp. Gen. 582 (1974). In our view, the key issue here is whether the agency has the discretionary authority to allow administrative leave, not whether it is retrospective or prospective.

In the present situation, we believe that the Board, in its discretion, has the authority to grant excused absences to its employees. The purpose of the MSPB partial shutdown was to permit the agency's continued functioning at some level for an uncertain length of time. Thus, the MSPB, to stretch out funds, which it reports still remained under the previously enacted continuing resolution, made a management decision to place employees on half-time status. Administrative leave with pay, whether retroactive or prospective, when an agency is without funds would be in violation of the Anti-Deficiency Act, 31 U.S.C. § 665 (1976). Here, however, the MSPB reports that funds were not lacking; rather the problem was uncertainty as to whether promised additional funds for future operation would be made available.

The enactment of the supplemental appropriations bill has, however, made it unnecessary for the MSPB to retain these previously appropriated funds for later use and has made the funds available to pay the employees for the period of the partial closing. The legislative history of the supplemental appropriations legislation includes statements by Representative Conte, the ranking minority member of the House Committee on Appropriations, during the debate, noting that the supplemental appropriations would permit use of the remaining funds under the continuing resolution to compensate employees for the nonworkdays resulting from the emergency situation. He stated:

"It would be unfair to penalize the employees because of the failure of Congress to pass the necessary legislation to allow the Board to operate at full scale * * * . [I]n my opinion, once the supplemental is passed and available to the Board, the furlough should be treated as a situation justifying administrative leave or excused absence so that employees can be justly paid." 128 CONG. REC. H4027 (daily edition, July 13, 1982) (remark of Representative Conte).

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Accordingly, we find that the Merit Systems Protection Board may, in its discretion, grant administrative leave retroactively to the employees affected by the partial shutdown, as a proper exercise of its administrative discretion to the extent to which funds had been appropriated and were available and adequate on the dates in question to cover the amount of the gross salaries of the affected employees.

for *F. B. Barclay, Jr.*
Comptroller General
of the United States