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DECISION

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

FILE: B-215998 **DATE:** April 1, 1985

MATTER OF: Robert L. Neal, Douglass F. Roy

DIGEST:

1. Reinstated employees who elected to retire when improperly removed from the Forest Service may be reimbursed for life insurance premiums deducted from their annuities during the period of erroneous retirement. However, in computing the backpay due the employees there must be deducted premiums for the same insurance coverage applicable to them as employees for the erroneous retirement period. Thus, they will be in the same financial position they would have been in absent the improper personnel action.

2. Insurance coverage is determined on the basis of the election of the employee. Administrative errors in processing forms do not alter the rights and liabilities of the employee. Therefore, when the agency reimburses an employee for backpay for a period he was improperly separated and retired, the computation of his insurance deductions should be made on the basis of the insurance coverage actually elected.

This action concerns whether or not two employees of the Forest Service, Department of Agriculture, who were improperly removed and retired and subsequently reinstated, should be reimbursed for deductions made from their annuities for life insurance premiums.1/

The employees elected to retire when they were removed from the Forest Service and both elected to continue

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1/ The matter was presented as a request for an advance decision by Betty Deaver, Authorized Certifying Officer, National Finance Center, Office of Finance and Management, U.S. Department of Agriculture, New Orleans, Louisiana.

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coverage under the Federal Employees Group Life Insurance Program. Premiums were deducted from their annuities. When the employees were reinstated, they included a claim for reimbursement for the insurance premiums in their claims for backpay. We find that the employees should be reimbursed for the premiums deducted from their retirement annuities, but the appropriate premiums applicable to them as employees for the same type of coverage must be deducted from their backpay award.

BACKGROUND

Mr. Robert L. Neal, Jr. and Mr. Douglass F. Roy are employees of the Forest Service, Department of Agriculture. On June 14, 1982, both employees were placed in an "absent without leave" status and were later removed from their positions for failure to accept assignments outside of their commuting areas. Both employees elected to retire at the time of removal. They appealed the removal actions to the Merit Systems Protection Board. The Board found that the employees had been improperly removed and ordered the Forest Service to reinstate the employees to their former positions as of June 14, 1982.

The employees were under age 65 during the period in question and were eligible for continued life insurance coverage when they retired. Both elected to carry the "No Reduction" or non-declining option for basic life insurance. In addition Mr. Neal also elected coverage under options A, B, and C. They now claim they should be reimbursed for the amounts deducted from their retirement annuities for insurance.

The authorized certifying officer, however, questions whether these credits may be allowed because the employees elected the insurance coverage, were covered by the insurance during the period of erroneous retirement, and therefore do not appear to be due a refund.

The issue involved is whether an employee who elects to retire at the time of an improper removal and elects to have premiums for life insurance deducted from his annuity is entitled to a refund of this amount upon his reinstatement.

LIFE INSURANCE PROGRAM

The statutory authority for Government life insurance for Federal employees is 5 U.S.C. § 8701-8716 (1982). Under this authority the Office of Personnel Management issues regulations which prescribe the time at which and the conditions under which an employee is eligible for coverage. These regulations are found at 5 C.F.R. Parts 870-873. See also Federal Personnel Manual (FPM) Chapter 870, and FPM Supplement 870-1.

An employee who retires from an insured position, who was insured for the 5 years immediately preceding retirement, who does not convert to an individual policy and who retires on an immediate annuity, may continue to be covered by Federal life insurance. 5 U.S.C. § 8706(b)(1) (1982). However, the eligible employee must make an election at the time of his retirement. The election affects the type of insurance coverage he will have after he reaches age 65 (or if the employee is over 65, it will affect the insurance coverage he will have when he retires).

The employee has three choices regarding the coverage for basic insurance he will have after age 65. He may elect "75 Percent Reduction" (after age 65, benefits are reduced monthly by 2 percent until they are 25 percent of the amount of insurance that would have been available at retirement). 5 C.F.R. § 870.601(c)(2). Employees who select the "75 Percent Reduction" pay no premiums for coverage after retirement. 5 C.F.R. § 870.501(g). He may elect "50 Percent Reduction" (after age 65 benefits are reduced monthly by 1 percent until they are 50 percent of the amount that would have been available at retirement) or "No Reduction" (benefits remain the same after age 65). 5 C.F.R. § 870.601(c)(3) and (4). For the 50 percent or the no reduction elections, the retiree's annuity is reduced by an amount based on the type of election made. 5 C.F.R. § 870.501(f)(2) and (3).

In addition, employees may elect to continue optional coverage. Option A provides standard life insurance, option B, additional life insurance in multiples of the employee's annual basic pay at retirement and option C provides insurance of family members. Payment for optional insurance is deducted from the retiree's annuity until he reaches age 65, at which time deductions cease and coverage is gradually reduced. 5 C.F.R. §§ 871.401(b), 871.601, 872.401(b), 872.601(a), 873.401(b) and 873.601.

ANALYSIS

As is indicated above, both employees selected the "No Reduction" option and Mr. Neal also elected optional coverage. Appropriate deductions were made from their annuities. They assert that since they were both under age 65 during the period in question, the amounts deducted for basic insurance purchased no "current" insurance, that is, no insurance for the period of erroneous retirement, and they should be reimbursed for the total amount that was deducted for that coverage. In addition it is argued that the law waives deductions for life insurance from backpay awards.

First, as to the waiver of premiums from backpay awards, the law, 5 U.S.C. § 8706(e), provides that if the life insurance of an employee stops because of a separation which is thereafter found to be erroneous, the employee is deemed to have been insured for the period of separation. This section also states that deductions for insurance that would have been made during that period should not be deducted from any backpay award, unless death or accidental dismemberment of the employee occurs during that period.

Since this statute directs waiver only in cases where insurance had been stopped, it is not applicable to the case before us where insurance coverage was continued during the period involved. This conclusion is supported by the legislative history of the statute which indicates that the purpose of the law was to remedy the specific problem of deduction of life insurance premiums from the backpay awards of reinstated employees to pay for insurance coverage for a period when the insurance had been stopped, the employee was not covered, and had he died during the period of separation, his beneficiaries would have received no benefits.2/

2/ Pub. Law 92-529, October 21, 1972, 86 Stat. 1050, added the provisions now contained in 5 U.S.C. § 8706(e). The purpose of those provisions is discussed in S. Rep. No. 92-1301, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. and Ad. News, 4232-4233, and H.R. Rep. No. 92-1289, 92d Cong., 2d Sess.

The employees also argue that although the life insurance premiums were deducted from their annuities, they received no immediate or "current" benefit from the payments made during the period of erroneous retirement for basic coverage. Since both retired at an age under 65 years old, had either of them died during the period of erroneous retirement, the benefits that would have been received by their beneficiaries under the "No Reduction" election would have been the same as they would have received if the employees had selected the "75 Percent Reduction" and nothing had been deducted from their annuities.

The agency points out that the employees elected insurance and were covered by the insurance during the entire period. They received the benefit of coverage under a non-declining plan and should therefore not be reimbursed. (We note that regarding the basic life insurance, the employees would not have received any additional benefits under the "No Reduction" election had they died prior to reaching age 65; however, amounts paid for options A, B or C in addition to basic life insurance did provide "current" and additional insurance during the period of erroneous retirement.)

Section 5596 of title 5 provides for backpay for an employee affected by an unjustified personnel action. The regulations implementing the statute are found in 5 C.F.R. § 550.801, et seq. A reinstated employee may receive an amount equal to all or any part of the pay, allowances and differentials which he would normally have earned during the period if the personnel action had not occurred, less certain deductions. The employee is deemed to have performed service for the agency during the entire period. In essence, to the extent possible, the employee is financially "made whole" through an award of pay, allowances and differentials. 5 C.F.R. § 550.805. However, the employee may not be granted more for pay, allowances and differentials than he would have received had the unjustified separation not occurred. 5 C.F.R. § 550.805(b).

In the present case, but for the erroneous retirement the employees would not have been receiving annuities and they would not have been paying premiums for insurance as annuitants. However, they presumably would have been paying for the insurance as employees.

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The backpay award should place the employees in the same financial position they would have been in had the improper action never occurred. Therefore, in computing their backpay award, they should be refunded premiums withheld for insurance during the erroneous retirement period. However, the premiums for the same type of insurance chargeable to them as employees must be deducted from the backpay award.

Regarding Mr. Neal's case, the agency found that errors had been made in the deductions for options A and B of his insurance during the erroneous retirement period. The Office of Personnel Management neglected to deduct for option A for a period of months, and for option B, deducted at the rate for five times his annual pay at retirement rather than for three times his pay as he selected. The agency asks how this error should be dealt with.

It is well established that insurance coverage is determined on the basis of the election of the employee. An election or waiver by an employee if done in accordance with the applicable law and regulations, is determinative of his rights and liabilities. Administrative errors in processing forms or in making deductions do not alter those rights and liabilities. See 34 Comp. Gen. 257 (1954); Bernard J. Killeen, B-198207, January 14, 1981.

Since by virtue of his election, Mr. Neal was covered under option A, and had he died at any time during the period of erroneous retirement, his beneficiaries would have been entitled to the benefits under option A, properly calculated premiums for option A coverage applicable to an employee should be included in the premiums deducted from his backpay award. Of course, the full amount he actually paid for option B while he was erroneously retired should be included in the amount refunded to him.

Accordingly, the amounts creditable to Mr. Neal and Mr. Roy for insurance coverage should be calculated as outlined in this decision.

for Harry R. Van Cleve
Comptroller General
of the United States