

DOCUMENT RESUME

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[Retroactive Substitution of Advance Sick Leave for Leave without Pay]. B-187171. June 7, 1977. 5 pp.

Decision re: Margaret E. Thorpe; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Internal Revenue Service.

Authority: Back Pay Act (5 U.S.C. 5596). 5 U.S.C. 6307. B-164825 (1968). B-181500 (1975). 5 C.F.R. 550.804. Lewis v. District of Columbia, 190 F.2d 25 (1951). Arrowhead Freight Lines v. United States, 114 F. Supp. 804 (1953).

Philip Russo, Acting Director of the Personnel Division of the Internal Revenue Service (IRS), requested an advance decision as to the legality of implementing a recommended grievance adjustment that would require the IRS to retroactively grant an employee 30 days of advance sick leave to be substituted for leave without pay granted to her. Corrective action may be taken if the IRS, upon review, should find that the original denial was an unjustified or unwarranted personnel action. (Author/SC)

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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON 20548**

FILE: B-187171

DATE: June 7, 1977

**MATTER OF: Margaret E. Thorpe - Retroactive Substitution of
Advance Sick Leave for Leave Without Pay**

DIGEST: Internal Revenue Service (IRS) questions whether it may retroactively grant 30 days advance sick leave and substitute it for leave without pay where the employee's original request for advance sick leave was denied on the assumption that employee would not return to duty. Employee did however, return to duty and filed a grievance over the denial. Her supervisor recommended that her advance sick leave request be granted retroactively. If IRS, upon review, should find that original denial was an unjustified or unwarranted personnel action under the Back Pay Statute, 5 U.S.C. § 5596, corrective action may be taken.

This action involves an August 10, 1976, letter request for an advance decision from Mr. Philip Russo, Acting Director, Personnel Division, Internal Revenue Service (IRS), Department of the Treasury, as to the legality of implementing a recommended grievance adjustment that would require the IRS to retroactively grant Ms. Margaret E. Thorpe, an employee, 30 days of advance sick leave and to substitute it for leave without pay (LWOP) granted to her for the period November 17, 1975, through January 2, 1976.

The facts relating to this case indicate that Ms. Thorpe's physician executed a Disability Certificate for her on October 30, 1975, that diagnosed her illness as chronic depression and stated that she should not report for work for a period of 6 weeks. Consequently, Ms. Thorpe was placed on sick leave on October 31, 1975. In early November, she requested 30 days of advance sick leave because her accrued sick leave would be depleted on November 14, 1975. Her request for advance sick leave was denied, however, she was advised that her request would be reconsidered provided she obtained a statement from the physician regarding her condition. Thereupon, Ms. Thorpe was placed on LWOP as of November 17, 1975. Subsequently, she submitted a letter from her physician dated November 26, 1975, which reconfirmed the diagnosis of chronic depression and indicated that so long as she remained in her present position, her prognosis was not good.

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In its submission to this Office, the IRS reports that its records reflect the following relevant facts and administrative determination:

"* * * In a memorandum dated December 4, 1975, the Chief, Office Branch advised the Chief, Collection Division and Chief, Personnel Branch that based on the information in the doctor's letter there seemed to be little chance of Mrs. Thorpe's returning to duty and he was reaffirming his original disapproval of her request for advance sick leave. Mrs. Thorpe was carried on LWOP for the period November 17, 1975 through January 2, 1976 except for seven hours of annual leave which fall into the use-or-lose category. This seven hours of annual leave was granted to preclude her losing it at the end of the leave year. Mrs. Thorpe returned to duty on January 5, 1976. Up to this point all Internal Revenue Service regulations for requesting advance sick leave and the disapproval of the request were adhered to.

"On January 7, 1976 Mrs. Thorpe, represented by the National Treasury Employees Union (NTEU), filed a grievance over being denied advance sick leave. On January 26, 1976 the Chief, Office Branch, having the delegated authority to approve advance sick leave, reversed management's position in his 2nd Step grievance reply. The Chief, Office Branch stated that since Mrs. Thorpe had returned to work the initial reason for denial (doubt of repayment) was now a moot point and that she would therefore be granted her requested advance sick leave retroactively. The question therefore is, in view of the fact that there were no procedural violations and no administrative error in the original decision to deny advance sick leave to Mrs. Thorpe, did the Chief, Office Branch, in his January 26, 1976 letter, and/or does the agency now have the authority to grant Mrs. Thorpe 30 days of advance sick leave and to substitute it for the LWOP granted to her for the period November 17, 1975 through January 2, 1976?"

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The granting of advance sick leave is governed by 5 U.S.C. § 6307 (1970). This provision bestows discretionary authority exclusively on the heads of executive agencies and departments to grant advance of sick leave or refuse such requests. Absent an abuse of such discretion, we have no authority to review the determinations of the agency in this matter. B-164825, September 17, 1968, and B-181500, April 2, 1975.

In the above-quoted submission, the IRS states that there were no procedural violations or administrative errors involved in the original agency determination that denied Ms. Thorpe's request, despite the fact that such determination was based on the assumption that it was unlikely that she would return to duty. While this assumption subsequently proved to be incorrect, the IRS maintains that it was valid when made.

The National Treasury Employees Union, Ms. Thorpe's representative, has submitted a letter to this Office, dated September 1, 1976, alleging that the IRS committed a procedural error in its original refusal to grant Ms. Thorpe's request for advance sick leave. That letter reads in part as follows:

"First, it should be pointed out that Ms. Thorpe is an employee with 25 years of service with the IRS. During this period of time, Ms. Thorpe has never had any history of leave abuse of any kind. Her performance has always been more than satisfactory.

"Second, Ms. Thorpe made a proper and timely request for the advance of sick leave when her accrued sick leave of 351 hours was exhausted in November, 1975. This request was supported by the required medical evidence.

"Third, Ms. Thorpe gave no indication that she was planning to leave the IRS as a result of her illness or depression. Her letter requesting an advance of sick leave simply states that she is under doctor's orders to remain off work for an additional period of time (4 weeks or 20 working days) beyond her sick leave balance. Further, the letters from Ms. Thorpe's doctor suggest only that the IRS attempt to find another position for

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her. They do not suggest that Ms. Thorpe could not return to work or that she would not be released to return to her position at IRS.

"For the above stated reasons, we believe that the IRS did commit a procedural error in failing to grant Ms. Thorpe advance sick leave in accordance with Section 333 (11)(3) of the Internal Revenue Manual. * * * Since the Internal Revenue Manual also provides that leave indebtedness may be recovered from an employee's retirement account, even if Ms. Thorpe had decided to resign from the IRS prior to accruing sufficient leave to cover the advance of sick leave, the agency would not have been harmed by her decision. * * *"

In reviewing the exercise of discretion given an agency in granting advance sick leave to an employee, it is not the function of a reviewing authority to substitute its judgment for that of the agency even for reasons which appear most persuasive. The fact that a challenged agency determination appears in retrospect to have been unwise or burdensome is insufficient to show that the agency exceeded its powers, inasmuch as lack of wisdom is not equivalent to an abuse of discretion. Lewis v. District of Columbia, 190 F.2d 25 (1951), Arrowhead Freight Lines v. United States, 114 F. Supp. 804 (1953). Accordingly, we have no authority to overturn the original IRS determination that denied Ms. Thorpe's request for advance sick leave.

The IRS, on the other hand, does have discretion to review the original determination on Ms. Thorpe's advance sick leave request under provisions of the Back Pay Statute, 5 U.S.C. § 5596 (1970) and Civil Service Commission regulations contained in 5 C.F.R. chapter 550 subpart H (1975). If upon such review it should find that the original denial of the request was improper on the basis of either substantive or procedural defects after consideration of the equitable, legal and procedural elements involved, it may take the corrective action prescribed in 5 C.F.R. § 550.804 (1975), which would include the substitution of 30 days advance sick leave for LWOP. Annual leave in excess of the maximum leave accumulation permitted by law may be restored in accordance with the provisions of 5 U.S.C. § 5596(b)(2) (Supp. V, 1975).

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In the absence of a finding by the IRS that Ms. Thorpe had undergone an unjustified or unwarranted personnel action, there would be no basis for corrective action in this case.

P. H. K. 11/22
Deputy Comptroller General
of the United States