

DECISION



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

FILE: B-199774

DATE: November 12, 1980

[Entitlement to]
MATTER OF: Dale Ziegler and Joseph Rebo - Discontinued
Service Retirement]

DIGEST: Agency asks whether retirements may be retroactively effected where agency determined that employees' impending separations were not involuntary so as to entitle them to discontinued service retirements. Later, OPM in identical situation ruled another employee was entitled to discontinued service retirement. Agency may retroactively change employees' records to show that they were retired on February 29, 1980. Here, agency failed to submit question of involuntary separation to OPM for advance decision as required by FPM Supp. 831-1, par. S11-2.a. This failure constituted administrative error which justifies retroactive relief.

The Defense Logistics Agency requests our decision on whether two of its employees may be retroactively granted discontinued service retirements. We hold that the two employees are entitled to be retired as of February 29, 1980, based on the agency's failure to timely submit the matter to the Office of Personnel Management.

Mr. David O. K. Lee, Director of Personnel, Defense Contract Administration Services Region, Los Angeles, states that the two employees, Mr. Dale Ziegler and Mr. Joseph Rebo, received reduction in force notices and offers of employment in January 1980. Their positions as Chief, Contract Administration Division were being abolished, and they were tendered offers of positions as Chiefs of Contract Management Division. These latter positions were in a different classification series than their former positions and involved additional duties.

Upon receipt of these letters, Messrs. Ziegler and Rebo immediately questioned whether the reduction

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in force and realignment qualified them for discontinued service retirements. They were incorrectly advised by their agency's personnel specialists that declining the position offers would not qualify them for discontinued service retirements. Eventually, they appealed this decision through the personnel office to the Director, Office of Civilian Personnel, for their region. He sustained the determination of the personnel specialist that their positions were not being abolished so as to entitle them to an early retirement. Upon receipt of this decision Mr. Ziegler and Mr. Rebo accepted the proffered positions on January 28, 1980, and February 1, 1980, respectively.

After the realignment, the agency was advised by the Office of Personnel Management (OPM) that another employee in identical circumstances was eligible for the discontinued service retirement. Applying the standards provided by OPM in that case, the agency reconsidered and determined that Messrs. Ziegler and Rebo had been eligible for discontinued service retirement. By letter of April 8, 1980, the agency requested OPM to rule on whether Messrs. Ziegler and Rebo could retire on that basis despite the fact that they had accepted new positions. On June 16, 1980, OPM replied by letter that, it sympathized with the employees' situation, but could not authorize retroactive separation dates which would be necessary to qualify the employees for discontinued service retirement. However, OPM suggested that the agency request the Comptroller General to authorize retroactive separation dates for these employees. If the Comptroller General authorized a retroactive separation, OPM, would treat the employees as having retired on February 29, 1980, and, as having served as reemployed annuitants thereafter.

For the purposes of this decision we assume that both Messrs. Ziegler and Rebo meet all the statutory and regulatory conditions to be eligible for the discontinued service retirement. Thus, the only issue we will address is whether DLA may retroactively amend their records to show that these employees were separated on February 29, 1980.

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Discontinued service retirement is authorized by 5 U.S.C. § 8336(d), which provides in pertinent part:

"An employee who is separated from the service--

"(1) involuntarily, except by removal for cause on charges of misconduct or delinquency

* * * * *

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity."

Federal Personnel Manual Supplement (FPM Supp.) 831-1, par. S11-2a. defines "involuntary separation" as including abolishment of position. That paragraph also states:

"The responsibility for determining whether a separation is involuntary for retirement purposes rests with the Commission [now OPM]. When an employee's decision between accepting another job offer or separation depends on whether the separation would be classed as involuntary for retirement purposes and doubt exists whether the proposed separation would be involuntary, the question should be referred to the Commission for advance decision, together with a statement of all the facts concerning the proposed action."

This paragraph requires the agency to submit the question to the Civil Service Commission (now OPM) for an advance decision when doubt exists concerning whether the separation is involuntary. The DLA did not submit Messrs. Ziegler and Rebo's case to OPM until after the effective date of the realignment. This had the effect of depriving the employees of their option to elect discontinued service retirements by leaving these employees in an untenable position: They could decline the new positions and hope that OPM eventually ruled in their favor, but, if OPM's ruling was adverse, they would have the status of former employees separated

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due to a reduction in force who were not yet eligible for retirement. Obviously, their only viable choice was to accept the new positions.

This Office has previously permitted the retroactive changing of the separation date of an employee where the employee's separation did not conform to the intent of the parties. B-159889, September 1, 1966. Additionally, we have permitted the retroactive advancing of an employee's separation date where the agency committed an administrative error by granting the employee terminal leave and advising her that she would continue to earn annual leave during that period. B-167146, July 31, 1969.

We believe that the intent of the FPM was to preserve the employees' option to elect the discontinued service retirement prior to the effective date of the proposed separations. But for the administrative error of DLA in not submitting the matter to OPM for an advance decision as required by FPM Supp. 831-1, par. S11-2.a, their right to elect discontinued service retirements would have been preserved. The record establishes that if the employees had been afforded this option, they would have elected the discontinued service retirements and their retirements would have been effected.

Accordingly, Messrs. Ziegler and Rebo are entitled to be separated retroactively as of February 29, 1980, in order to receive discontinued service retirements.

Larry R. Van Allen

For The Comptroller General
of the United States



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

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November 12, 1980

The Honorable Alan Cranston
United States Senate

Dear Senator Cranston:

This is in further reference to your letter of September 16, 1980, concerning Mr. Dale Ziegler.

Enclosed are two copies of our decision of today concerning Mr. Ziegler in which we authorize his employing agency to change their records to show his retirement on February 29, 1980.

Sincerely yours,

Harry R. Van Cleave

For The Comptroller General
of the United States

Enclosures