



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

PLM-1
Mr. Rissler

12420

B-196107 (RLR)

December 31, 1979

Mr. John Regan Stark
4815 Grantham Avenue
Chevy Chase, Maryland 20015

Dear John:

This replies to your letter of September 17, 1979, in behalf of Mr. Francis S. Stein. As you are aware, the Department of Labor previously submitted Mr. Stein's case to us and it was decided adversely to him in our decision, B-191495, April 10, 1978, a copy of which is enclosed. The issue is whether a part-time appointment under which Mr. Stein was employed for approximately 5 months in 1973 can be retroactively changed to a full-time appointment with advanced sick leave or leave without pay so as to permit Mr. Stein's retirement annuity to be retroactively recomputed at a higher rate. Mr. Stein contends that these retroactive changes should be permitted because he was erroneously advised by his personnel office that part-time employment would count as if it were full-time for annuity computation purposes.

I sympathize with Mr. Stein and wish GAO could help him. However, the only authority for retroactive changes of this nature is the Back Pay Act, 5 U.S.C. § 5596, and Mr. Stein's situation does not fall within the coverage of this law.

To be ^{eligible} for relief under the Back Pay Act as construed by the implementing regulations, 5 C.F.R. 550.801 et seq., an employee must have suffered an unjustified or unwarranted personnel action. Such a personnel action is defined as an act or omission which violates or improperly applies a nondiscretionary, mandatory requirement imposed by law, regulation, established policy, or binding agreement.

Since the employing agency had the authority to determine what type of appointment Mr. Stein was given, his part-time appointment did not violate any nondiscretionary or mandatory requirement. It was not, therefore, an unjustified or unwarranted personnel action which could be changed retroactively under the authority of the Back Pay Act. Moreover, while unfortunate, erroneous advice as to the subsequent effect of the part-time appointment upon his retirement annuity was a collateral matter and did not change the nature of the appointment in this regard. Consequently, since GAO

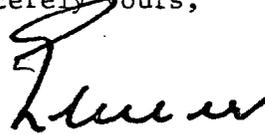
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has no authority to waive or modify the application of the law or its implementing regulations, we have no basis for changing our prior decision.

I regret that I can not give you a more favorable reply concerning Mr. Stein. The material you furnished us is returned herewith in accordance with your request.

Sincerely yours,



- Comptroller General
of the United States

Enclosures