



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marion R. Clark - Retroactive Substitution of Sick
Leave for Leave Without Pay

File: B-230644

Date: August 8, 1988

DIGEST

After separation from his employment with the government, a former employee seeks to have a portion of his period of leave without pay (LWOP) converted to sick leave because he was not previously informed that sick leave might be available to him while he held outside employment. We hold that sick leave may not be substituted retroactively after separation in the absence of a bona fide error or violation of a regulation governing the employee's separation.

DECISION

This decision is in response to a request by Mr. Charles R. Coffee, Acting Chief, Accounting and Finance Division, Office of the Comptroller, Defense Logistics Agency (DLA), for an advance decision concerning substitution of sick leave for leave without pay (LWOP) for Mr. Marion R. Clark, a former employee of DLA in Memphis, Tennessee. For the reasons that follow, we hold that substitution of the sick leave for Mr. Clark is not authorized.

BACKGROUND

Mr. Clark was on sick leave from November 1985 until May 1986 due to hypertension from job stress. In May 1986, Mr. Clark secured employment with a private sector computer firm. Therefore, he requested LWOP effective May 12, 1986, while he pursued an application with the Office of Personnel Management (OPM) for disability retirement. His request for disability retirement was unsuccessful, and the agency proposed his separation on grounds of disability on September 11, 1986. He did not reply to the proposed separation, and he was separated effective November 14, 1986. Subsequently, he received \$35,261.63 in severance pay payments.

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At the time Mr. Clark was placed on LWOP in May 1986, he had 502 hours of sick leave remaining in his account. The agency argues that Mr. Clark was not aware that under agency regulations, DLAR 1424.1, D, 4h, Absence and Leave, sick leave may be granted when an employee engages in outside employment if the nature of the disability clearly makes it evident that the employee is still incapacitated for the regular job even though the employee can engage in other employment. Thus, the agency argues that Mr. Clark might have used his 502 hours of sick leave. According to Mr. Clark, he was advised to request LWOP and he was not told of the possibility of his taking sick leave. He now requests substitution of the 502 hours of sick leave for LWOP during the 6-month period he was placed on LWOP.

OPINION

In our decisions concerning the substitution of leave after an employee has been separated from federal service, we have allowed such substitution only in cases of administrative error. B-142281, May 26, 1960; B-130418, Feb. 28, 1957. However, where no administrative error has been made and the employee seeks substitution because his previous choice was not judicious, we have held that substitution may not be allowed. See Jack D. Ellison, B-180436, Feb. 13, 1975.^{1/}

Specifically, we have held that there is no statutory authority to reimburse an employee for sick leave not granted prior to separation from service nor is there any authority to restore an employee to the rolls of an agency for the purpose of granting such leave unless there was a bona fide error or violation of a valid regulation in effecting the separation. Corie Sue Freeman, B-199477, May 3, 1982.

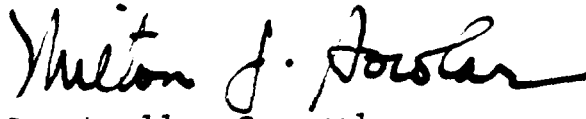
In the present case, Mr. Clark argues that he was advised to take LWOP and was not told about the possibility of continuing to use his sick leave. However, we fail to see any error committed by the agency in this case. When Mr. Clark advised the agency he had found employment outside the federal service, there would appear to be no basis to continue him in a paid leave status. Under the circumstances, it was entirely appropriate to grant LWOP to Mr. Clark while he pursued his request for disability

^{1/} An exception to this rule may be made for an employee who seeks by leave substitution to be compensated for all of the accumulated annual leave in the year of retirement. Lindsey v. United States, 214 Ct. Cl. 574 (1977). This is not the case in Mr. Clark's situation.

retirement. When OPM concluded that Mr. Clark did not qualify for disability retirement, the agency was obligated to separate the employee from federal service.

While we have doubts concerning the DLA regulation which allows an employee to remain on sick leave while engaged in outside employment, we note that Mr. Clark did not comply with the terms of the regulation which specify that before an employee engages in outside employment, the employee must notify the leave approving official of the nature of the employment and furnish acceptable evidence of the continuing incapacitation for duty.

Accordingly, we conclude that the agency may not retroactively substitute 502 hours of sick leave for Mr. Clark.

for 
Comptroller General
of the United States