

**DECISION**

18819 McCann PL  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE:** B-202274**DATE:** July 15, 1981**MATTER OF:** James J. Burns - Retroactive Discontinued Service Retirement

**DIGEST:** Agency abolished employee's position effective December 7, 1979, while he was on extended sick leave and detailed him to a nonexistent position. Agency did not notify employee of these personnel actions and his eligibility to elect a discontinued service retirement until February 1980. Office of Personnel Management denied employee's application for retirement on basis that employee cannot retire from nonexistent position. Agency may retroactively change effective date of separation to December 7, 1979, since agency did not provide employee with specific written notice prior to December 7, 1979, effective date of abolishment of position, of option to elect discontinued service retirement as required by regulation. This failure constitutes administrative error which justifies retroactive relief.

The Internal Revenue Service (IRS) requests our decision on whether the separation date of one of its employees may be retroactively adjusted for purposes of seeking a discontinued service retirement. We hold that the employee is entitled to be retroactively separated as of December 7, 1979, because of the agency's failure to properly notify the employee of his impending involuntary separation and his option to elect a discontinued service retirement.

Mr. D. S. Burckman, Director, Personnel Division, states that the former employee, Mr. James J. Burns, served as Chief, Field Branch No. 3, GS-13, at Camden, New Jersey, until a reorganization in which the duties of his position were absorbed in a GS-14 position. Mr. Burns was also given a temporary promotion to a GS-14 position for a period not to exceed December 7, 1979. On the date that his temporary promotion expired, Mr. Burns' original position was also abolished. The agency did not advise Mr. Burns of the abolishment of his position or his eligibility for discontinued service retirement because he was on extended sick leave at that time. Instead, he was assigned to a Group Manager,

[Entitlement to Retroactive Adjustment of Separation Date]

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GS-13, position on the staff of the Chief, Collection Division. Mr. Burns never performed the duties of this position. He was first advised of the abolishment of his position and his eligibility for discontinued service retirement in February 1980, while he was still on sick leave. On March 29, 1980, he responded that he wished to exercise his right to elect a discontinued service retirement on April 30, 1980. Mr. Burns was separated on that date and his retirement papers were submitted to the Office of Personnel Management.

Although the Office of Personnel Management (OPM) initially awarded a temporary "special payment" from the civil service retirement fund, upon final adjudication it denied Mr. Burns' application because the separation on which the claim was based was from a nonexistent position. It is the position of OPM that he cannot be separated from a fictitious position in which he never served. The Office of Personnel Management further states that Mr. Burns was eligible for discontinued service retirement on December 7, 1979, and is willing to treat Mr. Burns as having retired on that date and as having served as a reemployed annuitant thereafter if this Office will approve a retroactive change in the effective date of Mr. Burns's separation to December 7, 1979. Thus, the only issue we will address is whether IRS may retroactively amend their records to show that Mr. Burns was separated on December 7, 1979.

As a general rule a personnel action may not be made retroactive so as to increase the right of an employee to compensation. We have recognized exceptions to this rule where a clerical or administrative error occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy. Douglas C. Butler, 58 Comp. Gen. 51 (1978); Internal Revenue Service Employees, 55 id. 42 (1975); Panama Canal Commission Pilots, B-198983.2, November 19, 1980.

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,  
paragraph S11-2b provides in pertinent part:

"b. Requirement of specific  
written notice. It is not always necessary  
that an actual separation from Govern-  
ment employment be directed. However,  
an employee must have definite know-  
ledge from a specific written notice  
that he or she faces involuntary  
separation from his or her position  
or from Federal service as of some  
specific date because of coming organi-  
zational changes before his or her  
resignation may be accepted as invol-  
untary and qualifying for discontinued-  
service retirement.\* \* \*"

This paragraph clearly requires that the agency notify  
the employee, in a specific manner, of the impending in-  
voluntary separation. There is no evidence in the record  
of Mr. Burns having received such notice.

The failure to give notice had the effect of depriving  
Mr. Burns of his right to elect a discontinued service retire-  
ment. The intent of the above-quoted regulation is to preserve  
the employee's option to elect discontinued service retirement  
prior to the effective date of a separation. But for the ad-  
ministrative error of IRS in not notifying Mr. Burns, his  
right to elect discontinued service retirement would have  
been preserved. See Dale Ziegler and Joseph Rebo, B-199774,  
November 12, 1980. Furthermore, on the basis of the correspon-  
dence between IRS and Mr. Burns after he was finally given  
notice, it is clear that he would have elected discontinued  
service retirement and would have been separated on December 7,  
1979.

B-202274

Accordingly, we hold that the IRS may retroactively separate Mr. Burns as of December 7, 1979.

A handwritten signature in cursive script, reading "Milton J. Arold".

Acting Comptroller General  
of the United States