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DECISION



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

FILE: B-210645

DATE: August 12, 1983

MATTER OF: Kenneth A. Gordon - Change of Separation Date in Order to Use Accumulated Leave

DIGEST:

Widow of former employee seeks to cancel employee's resignation on January 9, 1982, and substitute sick and annual leave until employee's death on July 3, 1982. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no evidence of administrative error, violation of policy or regulation, or contrary intent which would warrant a change in the employee's separation date.

The issue here concerns whether a former employee's resignation date may be moved forward 6 months to the date of his death which would permit payment for accumulated sick leave, life insurance benefits, and a survivor's retirement annuity. We hold that the separation date may not be changed in the absence of administrative error, the failure to follow agency regulations, or the failure to conform to the intent of the parties, none of which are evident in this case.

This decision is in response to a request from the Honorable Mark S. Fowler, Chairman, Federal Communications Commission (FCC). The request is in response to a claim from the widow of a former FCC employee, Kenneth A. Gordon.

Mr. Gordon was employed by the FCC from September 1971, until January 9, 1982, when he "very unexpectedly" resigned stating as his reasons, "[p]lay cap limits objectives." It appears that in April 1982, Mr. Gordon showed signs of illness, and he subsequently died of cancer on July 3, 1982. Mrs. Gordon seeks to change Mr. Gordon's resignation date from January 9 to July 3, 1982, which would permit payment for unused sick leave (735 hours) and would result in her entitlement to life insurance benefits and a survivor's annuity.

026383

Mrs. Gordon claims that her late husband was unaware of his terminal illness until shortly before his death, but that according to the doctors, his illness had been developing for some time, as much as two years earlier. Mrs. Gordon argues that his illness reduced his ability to function normally during the period prior to his resignation and reduced his capacity to make a responsible decision regarding his resignation.

The agency report states that had they known of Mr. Gordon's medical condition, they would have counseled him concerning disability retirement and encouraged him to remain on the rolls pending a medical review for retirement purposes. The agency notes, however, that Mr. Gordon did not state ill health as a reason for his resignation, although his sudden resignation was considered, "uncharacteristic from our perspective."

Our decisions have held that generally the date of separation by resignation is the date tendered by the employee, and such date may not be challenged once it becomes an accomplished fact. Ralph R. Sturges, B-189895, November 2, 1977, citing 32 Comp. Gen. 111 (1952). An employee may not be restored to a pay status for any period subsequent to the date of separation for the purpose of granting leave unless there was an administrative error or a violation of a regulation or policy in effecting the separation. B-164232, May 28, 1968. See also Federal Personnel Manual, Chapter 715, S1-2a. Thus, we have permitted corrective action when the circumstances of a particular case show that the resignation was not accepted in the terms submitted or that the resignation as executed did not conform to the intentions of the parties. 21 Comp. Gen. 517 (1941).

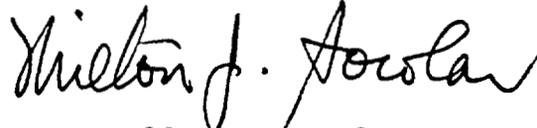
There does not appear to be any violation of policy or regulation in this case since there is no indication that the agency knew or should have known of his illness. As the agency points out, the Federal Personnel Manual, Chapter 715, S2-5, suggests counseling employees who propose to resign for reasons of ill health in order to review the advisability of disability or optional retirement. Our prior decisions permitting changes in the separation date have involved situations where the agency was aware of the employee's illness and should have permitted the use of

sick leave prior to the employee's retirement. See B-175201, June 2, 1972; and B-174708, February 4, 1972. However, in the present case Mrs. Gordon admits that no one knew of Mr. Gordon's illness until very shortly before his death. Therefore, there is no evidence of any violation of policy or regulation in failing to counsel Mr. Gordon prior to his resignation.

As to the intent of the parties, there is no indication that Mr. Gordon requested anything other than resignation. See, for example, our decision in Sturges, cited above, where we had to resolve doubt as to whether the employee wished to resign or take a leave of absence. We concluded in Sturges that the employee intended to resign based on the evidence before us. In the present case, we have no evidence to the contrary of Mr. Gordon's intent to resign except the statement from Mrs. Gordon that had he known of his illness he would not have intended to resign. This does not establish contrary intent sufficient to change his separation date.

Finally, Mrs. Gordon suggests that the illness reduced Mr. Gordon's capacity to make a responsible decision regarding his resignation. There is no evidence in the record before us of mental problems or diminished mental capacity. As we held in Sturges, cited above, a judicial adjudication of incapacity would be required in order to limit the legal rights and powers of an adult. See Texas Civil Statutes, Probate Code, Chapter IX, and Texas Civil Statutes, Article 5547-83. In the absence of such a determination, we must presume that Mr. Gordon had the legal mental capacity to discharge his rights and obligations.

Accordingly, we find no basis to allow a change in Mr. Gordon's separation date in order to grant him accumulated sick and annual leave to the date of his death. Therefore, Mrs. Gordon's claim may not be allowed.

for 
Comptroller General
of the United States