

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

25987

FILE: B-209652**DATE:** August 12, 1983**MATTER OF:** Gladys W. Sutton - Administrative Leave
in Lieu of Leave Without Pay**DIGEST:**

1. Employee chose not to work while her discontinued service retirement papers were being processed, even though she knew that a planned transfer of function had been postponed and that there was doubt as to her eligibility to retire. After 5 weeks, she returned to work and was placed on leave without pay (LWOP) for the 5-week period. Her request that the LWOP be changed to administrative leave is denied since there is no authority for granting administrative leave for such purpose or for such extended period.
2. Employee chose not to work while her discontinued service retirement papers were being processed, even though she knew that a planned transfer of function had been postponed and that there was doubt as to her eligibility to retire. After 5 weeks off duty, she returned to work and was placed on LWOP for the 5-week period. She is not entitled to backpay for the 5 weeks she did not work under the Back Pay Act, 5 U.S.C. § 5596, since there was no unjustified or unwarranted personnel action by the agency.

The issue presented is whether an employee who was placed on leave without pay (LWOP) for an extended period of time in order to preserve her eligibility for a discontinued service retirement may have administrative leave substituted for the period of LWOP. We hold that she may not be retroactively placed on administrative leave in lieu of LWOP since there is no authority for an agency to grant administrative leave for such a purpose or for such an extended period of time.

This decision is in response to a request from Mr. David C. Zeigler, Director of Administrative Programs for the Department of Labor's Occupational Safety and Health

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Administration (OSHA), concerning the propriety of adjusting the pay and leave accounts of Ms. Gladys W. Sutton, a former OSHA employee.

FACTS

Ms. Sutton was employed as a grade GS-7 Education Technician in OSHA's Office of Training and Education (OTE) in Washington, D.C. In January 1982, the Department of Labor decided to move OTE's offices from Washington to Des Plaines, Illinois. On April 23, 1982, OSHA notified employees that the office's transfer of function would be effective June 26, 1982. The employees were given 31 days to either accept or decline the transfer to Illinois.

In light of the impending transfer, in April 1982, Ms. Sutton asked OSHA personnel officers to find out whether she would be eligible to retire from Federal service, effective June 26, 1982. Personnel officials determined that although Ms. Sutton was not eligible for optional retirement, she would be eligible for a discontinued service retirement on June 26, 1982, because of her involuntary separation from OTE resulting from the transfer of function.

In May 1982, Ms. Sutton formally declined the transfer to Illinois. On May 25, she and other OTE employees who refused to move were given notice of a proposed adverse action by the agency for their removal. In light of this action, on June 9, 1982, Ms. Sutton submitted to the OSHA personnel office the documentation necessary to process her discontinued service retirement. Before taking action to process Ms. Sutton's retirement papers, however, the OSHA personnel office contacted the Office of Personnel Management (OPM) in order to confirm its prior determination that Ms. Sutton was eligible for discontinued service retirement. Ms. Sutton was aware that the processing of her retirement papers was being delayed because OSHA had asked for OPM's guidance in the matter.

On June 21, 1982, the agency rescinded its proposed adverse action pending a determination by the Federal Service Impasses Panel (FSIP) concerning the sufficiency of the notice period designated by OSHA in connection with the transfer of function. In light of this review by the FSIP, OSHA agreed to maintain the status quo, and not to take action to remove employees on June 26, 1982, the date

previously designated for the transfer of function. Ms. Sutton received notice that the proposed adverse action had been rescinded by the agency via certified mail on June 24, but she continued to work only through June 26, 1982. She could have continued to work after that date, but she chose not to return in order to preserve her right to retire effective that date.

On July 14, 1982, the FSIP ordered that the notice period given to employees affected by OTE's transfer of function be extended through August 31, 1982, and that the effective date of the office's transfer be changed to September 1, 1982. Ms. Sutton was informed of this change in the effective date of transfer, and that she would have until August 9, 1982, to either accept or decline the transfer.

On July 21, 1982, OPM advised OSHA that Ms. Sutton was not eligible to retire on a discontinued service basis effective June 26, 1982, because the effective date of the transfer of function had been changed to September 1, 1982. The OPM stated that on June 26, 1982, she did not have definite knowledge from a specific written notice that she faced involuntary separation on a specified date, since the agency had rescinded the proposed adverse action notices that it had previously served on OTE employees who had declined the transfer. Without definite knowledge concerning her separation date, and without an adverse action in hand, Ms. Sutton was found to be ineligible for discontinued service retirement effective June 26, 1982.

Later that day, the OSHA personnel office informed Ms. Sutton that, as a result of OPM's determination, her retirement date would have to be postponed. Ms. Sutton was also informed at that time that, if she did not want to come back to work pending the arrangement of a new retirement date, she had the option to be placed on leave without pay (LWOP) retroactively, from June 28, 1982, through the actual effective date of the transfer of function, and that any time she spent in LWOP status would be viewed as creditable service toward her annuity computation.

After consulting with personnel officers both at OSHA and OPM, Ms. Sutton decided to report back to work on August 3, 1982. At that time, she also agreed to be placed on LWOP for the 5-week period from June 28, 1982, through

August 2, 1982. Thereafter, on August 10, 1982, Ms. Sutton received a second proposed adverse action notice, which called for her removal effective August 31, 1982. Ms. Sutton continued to work until the date specified for her involuntary separation, and was thereafter granted a discontinued service retirement effective August 31, 1982.

By a letter to the OSHA personnel office, dated August 13, 1982, Ms. Sutton requested that she be retroactively placed on administrative leave, in lieu of LWOP, for the period from June 28 through August 2, 1982. The agency was unable to resolve the matter internally, and, therefore, requested a decision from this Office.

OPINION

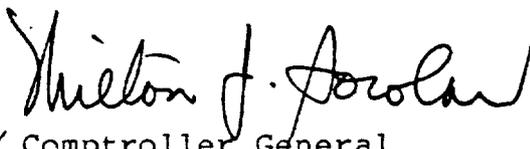
There is no general statutory authority for what is commonly referred to as administrative leave, under which Federal employees may be excused from their official duties without loss of pay or charge to leave. Nevertheless, it has been recognized that in the absence of specific statutory authority, the head of an agency may, in certain situations, excuse an employee for brief periods of time without a charge to leave or loss of pay. Some of the more common situations in which agencies generally excuse absence without a charge to leave are discussed in the Federal Personnel Manual Supplement 990-2, Book 630, Subchapter 11-5. These include blood donations, tardiness and brief absences, taking examinations, attending conferences or conventions, and representing employee organizations. See Edward McCarthy, B-192510, April 6, 1979.

We have held that, in view of the specific situations in which administrative leave may be granted, there is no general authority for an agency to grant administrative leave for an extended period of time. 53 Comp. Gen. 1054 (1974), and Edward McCarthy, above. This is true even in cases where an employee seeks to be granted extended administrative leave for the purpose of retroactively correcting an alleged agency error. Frederick W. Merkle, Jr., B-200015, November 17, 1980. Therefore, Ms. Sutton is not entitled to administrative leave for the period between June 28, 1982, and August 2, 1982, when she was placed in a LWOP status.

Furthermore, we do not believe that the circumstances described above entitle Ms. Sutton to relief under the Back Pay Act, 5 U.S.C. § 5596 (1976). The Back Pay Act provides that an employee who is found to have been affected by an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or part of her pay, allowances, or differentials otherwise due, is entitled to recover the amount she would have received if the personnel action had not occurred. John Cahill, 58 Comp. Gen. 59 (1978). An unjustified or unwarranted personnel action is defined in 5 C.F.R. § 550.803 (1983), as an act of commission or omission that is subsequently determined, based on substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory agency personnel policy.

We do not believe that OSHA's actions in this case constituted an unjustified or unwarranted personnel action so as to entitle Ms. Sutton to retroactive compensation under the Back Pay Act. Although Ms. Sutton could have continued to work after June 26, 1982, she chose not to do so, despite the fact that her retirement was not yet finalized, and even though significant questions had been raised concerning her eligibility for discontinued service retirement. Even after being informed on July 21, 1982, that her retirement date had to be postponed, she chose to continue to stay away from the office. She did not return to work until August 3, 1982, and, on that date, she agreed to be placed in a LWOP status retroactive to June 28. Under these circumstances, there was no unjustified or unwarranted personnel action by the agency so as to entitle Ms. Sutton to backpay under 5 U.S.C. § 5596.

Accordingly, there is no legal basis upon which Ms. Sutton may be retroactively placed on administrative leave, in lieu of LWOP, from June 28, 1982, through August 2, 1982, or be paid for that period.

for 
Comptroller General
of the United States