Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Voluntary Leave Transfer Program—Disability Retirement

File: B-271561.2

Date: July 26, 1996

DIGEST

Where an employee has been in a leave status for over a year due to a serious illness from which he is not expected to recover sufficiently to return to duty, the agency should take steps to initiate disability retirement for him rather than allow him to remain on the roles on annual leave to use up the 10,000 hours of leave transferred to him under the Voluntary Leave Transfer Program. The program was not established as a substitute for disability retirement. Upon approval of disability retirement or upon separation, the remaining unused transferred leave must be returned to the donors, and it may not be credited toward the employee's time in service for retirement purposes.

DECISION

This action is in response to a request from the Inspector General of the Department of Transportation for an opinion concerning the application of the leave transfer program and the disability retirement program in the case of an employee of the Inspector General's Office who suffered a serious illness and has been in sick and annual leave statuses since May 1995, and who is not expected to recover sufficiently to return to duty.

Background

The Inspector General states that in October 1995, the employee's participation in the leave transfer program was approved based on a medical certification from his physician citing the employee's significant improvement and the need to provide him with as much opportunity as possible to recover. Since then, over 10,000 hours of annual leave have been donated to him. The Inspector General reports that this would be more than sufficient to allow the employee, a criminal investigator, to remain on annual leave until he reaches retirement eligibility as a law enforcement officer in October 1999, and there is an expectation on the part of the employee and his spouse that he will be permitted to remain in leave status up to that date and beyond.

The Inspector General states that the employee's current condition is such that he is unable to perform the duties of his position and he is not expected to improve sufficiently to allow him to return to duty in the future. The Inspector General further states that to permit the employee to remain in such a leave status for the contemplated period would create a hardship for the agency since the employee's position could not be filled and he could not contribute to the mission of the agency. Our opinion is therefore requested on several questions concerning whether, in these circumstances, the voluntary leave transfer program regulations permit the agency to terminate the employee's medical emergency status, which allows him to continue to receive and use donated leave under the program, and initiate disability retirement for him.

The Inspector General notes that the regulations provide no guidance with respect to the duration of a medical emergency under the leave transfer program, particularly as to whether an employee in the described circumstances remains in such an emergency status although over a year has passed since the initial onset of the disabling illness. The Inspector General therefore asks us to determine whether the employee's situation no longer constitutes a medical emergency under the program, and if we determine that it no longer constitutes such an emergency, she asks--

1. is the agency required, under the regulations and based on the impact to its operations, to initiate disability retirement for the employee even though the agency has received leave donations sufficient to keep the employee in a leave status until the date of his retirement eligibility and beyond, and

2. may the employee immediately claim all of the donated leave in a lump sum and apply the leave toward his time in service for retirement purposes?

Analysis and Conclusions

Pursuant to 5 U.S.C. § 6332, the Office of Personnel Management (OPM) has established the Voluntary Leave Transfer Program, as provided for by 5 U.S.C. §§ 6331-6340, to allow employees to transfer unused accrued annual leave to another employee who needs such leave because of a medical emergency. See OPM's implementing regulations in 5 C.F.R. Part 630, Subpart I.

The legislative history of Public Law 100-566, 102 Stat. 2834 (1988), which initially enacted 5 U.S.C. §§ 6331-6340, indicates that Congress recognized that federal employees have no short-term disability coverage as such and must rely on sick leave for short-term illnesses and the disability provisions of the federal retirement systems for long-term illnesses. Congress intended the leave transfer program to close the gap in such coverage. See S. Rep. No. 100-437, 100th Cong. 3 (1988), reprinted in 1988 U.S.C.C.A.N. 3688. The legislative history also states that the

program "was not meant to be a substitute for disability retirement, and agencies should encourage employees to apply for disability retirement if circumstances warrant it," and that "once the application [for disability retirement] has been approved, the leave recipient may not receive or use additional transferred leave and the personal emergency is considered terminated." S. Rep. No. 100-437, supra, 7, 1988 U.S.C.C.A.N. 3693.

In accordance with the statutory provisions, the regulations define "medical emergency" to mean:

> "a medical condition of an employee or a family member of such employee that is likely to require an employee's absence from duty for a prolonged period of time and to result in a substantial loss of income to the employee because of the unavailability of paid leave" 5 C.F.R. § 630.903 (1995), implementing 5 U.S.C. § 6331(4).

The termination of a medical emergency is governed by 5 C.F.R. § 630.910, implementing 5 U.S.C. § 6335. Section 630.910(a) provides several circumstances under which a medical emergency shall terminate, including as is pertinent to this case, when the leave recipient's federal service is terminated, or at the end of the biweekly pay period in which the leave recipient's employing agency receives notice that OPM has approved an application for disability retirement for the leave recipient under the Civil Service Retirement System or the Federal Employees' Retirement System. The regulation also provides that the employing agency shall continuously monitor the status of the medical emergency affecting the leave recipient to ensure that the leave recipient continues to be affected by a medical emergency. 5 C.F.R. § 630.910(b).

In addition, 5 C.F.R. § 630.910(c) provides that when a medical emergency terminates, no further requests for transfer of annual leave to the leave recipient may granted, and any unused transferred leave remaining to the credit of the leave recipient shall be restored to the leave donors under 5 C.F.R. § 630.911. This provision implements 5 U.S.C. § 6335(b), which provides that the employing agency shall, consistent with guidelines prescribed by OPM, establish procedures to ensure that a leave recipient "is not permitted to use or receive any transferred leave" after the medical emergency terminates. See also, Mary Dawson, 70 Comp. Gen. 432 (1991).

In response to the Inspector General's first question, while apparently the employee continues to be in a "medical emergency" status as defined in the statute and regulation cited above, it is our view that the law and regulations do not require the agency to retain the employee indefinitely on its roles in a leave status merely because a large amount of leave has been donated to him and he prefers to remain in that status. In fact, to do so, rather than initiate disability retirement procedures,

would appear contrary to the purpose of the program as expressed in the legislative history referred to above. The regulations clearly contemplate that the agency should monitor the employee's condition. When it appears that it is unlikely that he will recover sufficiently to resume his duties, particularly when he has been unable to work for such a long period, as in this case, the employee should be encouraged to apply for disability retirement and he should be provided assistance in doing so. As is noted above, upon the agency's receipt of notice that OPM has approved the disability retirement application or upon the employee's separation, the medical emergency terminates. 5 C.F.R. § 630.910(a), supra.

We note that both the Federal Employees' Retirement System and the Civil Service Retirement System provide for disability retirement for individuals who have become disabled because of a medical condition resulting in a service deficiency in performance, conduct, or attendance, and whose disabling medical condition is expected to last at least a year from the date the application for disability retirement is filed. 5 C.F.R. §§ 831.1203 and 844.103. The regulations also provide for the agency to file a disability retirement application on behalf of an employee in certain circumstances. 5 C.F.R. §§ 831.1205 and 844.202. However, the administration of these retirement systems are under the jurisdiction of OPM, and we suggest therefore that the Inspector General consult with OPM regarding the appropriate steps to take in this case to initiate disability retirement for the employee.

In response to the second question, whether the employee may apply the unused transferred annual leave in a lump sum toward his time in service for retirement purposes, we know of no authority for crediting annual leave for such a purpose.[1]

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[1]The determinations of creditable service for retirement under the Civil Service Retirement System and the Federal Employees' Retirement System are matters within the jurisdiction of OPM. 5 C.F.R. §§ 831.101 and 841.105. While provision is made for crediting unused sick leave in the computation of annuities under the Civil Service Retirement System (5 C.F.R. § 831.302), no provision is made for crediting unused annual leave under either system. 5 C.F.R. Part 831, Subpart C, and Part 842, Subpart C.

In any event, as is noted above, upon termination of the medical emergency, any unused transferred annual leave remaining to the credit of the leave recipient must be restored to the leave donors, as provided by 5 C.F.R. §§ 630.910(c) and 630.911. Therefore, this question is answered in the negative.

/s/Seymour Efros
for Robert P. Murphy
General Counsel