



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

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B-177739

June 5, 1973

The Honorable George P. Shultz
The Secretary of the Treasury

Dear Mr. Secretary:

We refer to letter of December 29, 1972, from Mr. Warren F. Brecht, your Assistant Secretary for Administration, requesting our determination as to whether your Department may properly receive a resignation submitted on April 9, 1951, by Mr. Raymond Zembrzanski, an employee of the Internal Revenue Service, and restore him to the rolls in a leave-without-pay status for a period of time that he was receiving medical treatment in 1951 and 1952. Mr. Zembrzanski has questioned the legality of the requirement for his resignation in 1951 and has requested reinstatement to the rolls for approximately 10 months between April 9, 1951, and February 4, 1952.

It appears that in 1951 Mr. Zembrzanski, a Tax Account Clerk in the Office of the Collector of Internal Revenue, Detroit, Michigan, and a disabled veteran, requested that he be placed in a leave-without-pay status for a period of 6-12 months so that he could receive medical treatment for his service connected disability. He was refused permission for the extended leave without pay and was instead requested to resign. He was subsequently given an indefinite appointment to the same position at the same location on February 4, 1952.

The administrative disallowance of Mr. Zembrzanski's request appears to be contrary to the instructions contained in Executive Order 5396, July 17, 1930. That Order is worded as follows:

SPECIAL LEAVES OF ABSENCE TO BE GIVEN
DISABLED VETERANS IN NEED OF MEDICAL
TREATMENT

With respect to medical treatment of disabled veterans who are employed in the executive civil service of the United States, it is hereby ordered, that upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave as may be permitted by law and such leave without pay as may be necessary shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment, all without penalty in his efficiency rating.

[Proposed Resignation] 720079 091516

The granting of such leave is contingent upon the veterans' giving prior notice of definite days and hours of absence required for medical treatment in order that arrangements may be made for carrying on the work during his absence.

A recent administrative investigation has elicited the following facts concerning Mr. Zembrzanski's case:

- (1) The last paragraph of the original Standard Form 57 completed by Mr. Zembrzanski on February 2, 1950, clearly shows in items number 33 and 34 that he is in fact a disabled veteran.
- (2) Standard Form 52 on which Mr. Zembrzanski requested resignation on April 9, 1951, gives the following reason for the resignation: "I am forced to resign cause it has been refused to grant me an absence without leave for a period of 6 months to a year due to a service connected disability illness."
- (3) A statement dated March 2, 1972, from the Chief, Medical Administration Division, Veterans Administration Hospital, Allen Park, Michigan, showing hospital records indicate that Mr. Zembrzanski was hospitalized 3-1-51 to 10-4-51 for a service connected condition.
- (4) Mr. Zembrzanski's memorandum dated January 31, 1972 to Chief, Personnel Division, indicates that he entered the Dearborn Veterans Hospital, Dearborn, Michigan in early 1951 for a service connected disability. He used all his accumulated sick and annual leave up to 4-9-51, the date his leave expired, and at that time applied for extended leave without pay. His request for leave without pay was denied and at the request of the personnel officer he submitted his resignation on Standard Form 52.

Mr. Brecht further notes that although it cannot be definitely established at this time that Mr. Zembrzanski complied with the contingencies of Executive Order 5396, it appears that ample prior notice was given. In

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addition, because of the long period of time that has elapsed, it can be neither refuted nor substantiated whether or not an official statement from a duly constituted medical authority was submitted stating the medical treatment was required. It is noted, however, that the fact that he was hospitalized prior to the time he requested extended leave without pay is indicative of the awareness of his need for medical treatment. It is administratively recommended that corrective action be taken to give Mr. Zembrzanski the additional 10 months service because of the apparent administrative error made in 1951.

The regulations governing the granting of leave without pay in effect in 1951, then found in Chapter LI of the Federal Personnel Manual (FPM), stated, "An employee cannot demand that he be granted leave without pay as a matter of right, except in the case of disabled veterans who are entitled to leave without pay if necessary for medical treatment under Executive Order 5396 * * *." Since it appears that Mr. Zembrzanski was entitled to be placed in a leave-without-pay status for the periods in 1951 and early 1952 that he was off the rolls after being required to resign and in line with the administrative recommendation thereto, we would interpose no objection to correcting his records at this time to show Mr. Zembrzanski as being in a leave-without-pay status for the period from April 9, 1951, to February 4, 1952. However, the regulations of the Civil Service Commission should be consulted as to what portion of that period is creditable towards service for retirement purposes. The question of whether or not time in a particular pay status is creditable for civil service retirement purposes is a matter primarily within the jurisdiction of the Civil Service Commission rather than our Office. We invite your attention, though, to subchapter 13 of FPM Supplement 831-1 regarding service creditable for retirement purposes, particularly paragraph 83-4 thereof concerning employees in a leave-without-pay status for more than 6 months in a calendar year.

As to the effect of such corrective action on Mr. Zembrzanski's leave and salary status, this Office is barred from considering any claims not received in this Office within 10 years after the date they first accrued. See 51 U.S.C. 71a, 237. However, because of the continuing nature of claims such as those involving accrual of leave and within-grade step increases, where each time an employee does not receive a salary step increase or leave which he would have been entitled to had it not been for an administrative error a new claim arises, we have held that only such claims as arose prior to the beginning of the 10-year period are barred from consideration. In that regard, Mr. Zembrzanski's claim was

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received in this Office on January 4, 1973, and therefore any pay claims for periods prior to January 4, 1963, would be subject to the statute of limitations.

Had Mr. Zembranski been carried in a leave-without-pay status during the period in question, the period of such time as would have been creditable for retirement purposes would have been equally creditable for leave accrual purposes and he would have become eligible to accrue leave at the 6 and 8-hour rates at correspondingly earlier dates. Therefore, following a determination of the amount of such time creditable for retirement purposes, Mr. Zembranski's leave account should be reconstructed and the maximum limitations applied to determine whether he is entitled to additional leave as the result of not being advanced to a higher leave accrual category when he should have been.

Concerning step increases in pay, the law and regulations in effect at the time here involved provided that a nonpay status not to exceed 6 workweeks in the aggregate is creditable as service toward a step increase. Therefore it may be that any step increases to which Mr. Zembranski was entitled beginning in 1952 should have been granted him 6 weeks earlier (assuming he has not had other nonpay status periods of service) than he otherwise was granted. Accordingly, his payroll records from February 4, 1952, to the present should be reconstructed as if he had been properly carried on the rolls during the period in question and Mr. Zembranski is entitled to reimbursement for any periods since January 4, 1963, that he was underpaid as a result of receiving step increases at a time later than he should have received them.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States