

DECISION



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

40959

FILE: B-179965

DATE: July 18, 1974

MATTER OF: *Claim for* Back pay and damages for loss of home while employee was on involuntary leave

DIGEST: Although civilian employee was absent on paid leave and leave without pay pending Civil Service Commission determination of his application for disability retirement, he is not entitled to back pay during such period of absence from duty upon Commission disallowance of such application since there is no evidence that such leave was involuntary and that employee was ready, willing and able to work during such period; also, there is no legal basis to reimburse him for the loss of his home due to foreclosure of mortgage during such period. 13

This action is a review of the disallowance by our Transportation and Claims Division of the claim of William C. Burke, a former employee of the Erie Army Depot, for back pay during the period October 13, 1964, to July 19, 1965, when he was in a leave-without-pay status, and for amounts stated to be due for the loss of his home during such period.

2 Mr. Burke was employed by the Department of the Army at its Erie Army Depot, Port Clinton, Ohio, as a guided missile mechanical installer and repairer. Mr. Burke states that his left ear became infected and that he felt the infection was caused by his work conditions. After consultation with a doctor it was planned that he would enter the Veterans Administration Hospital at Cleveland, Ohio, on October 2, 1964. Mr. Burke states that his request for advance sick leave was denied and, while he was quite ill and not fully aware of what he was doing, he applied for disability retirement on September 30, 1964. Regarding this action Mr. Burke alleges that the Erie Army Depot was being closed down and agency personnel suggested his retirement prior to his going into the hospital. P-3707 P-2203

3 It appears that Mr. Burke was in a paid leave status until October 13, 1964, when he was placed on leave without pay. He states that he was released from the hospital on November 1, 1964, and that during December 1964 he tried without success to get his retirement application rescinded. He states that by January 1965 he was without funds and lost his home through foreclosure of the mortgage which began in March 1965.

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On May 3, 1965, the Civil Service Commission disallowed Mr. Burke's application for disability retirement and on May 6, 1965, he reported to the Erie Army Depot but refused to work when the job he was placed on was the same one he previously occupied. The record indicates that his agency on May 11, 1965, requested the Civil Service Commission to reconsider its decision since Mr. Burke's physician, the Veterans Administration, and the Post Medical Officer imposed physical limitations on his employment--apparently he could not be exposed to any work that would result in dust, dirt or debris of any kind entering his left ear--and since due to the phase-out of Depot operations, it appeared necessary to separate him as it was difficult to place employees with physical restrictions. Apparently the Civil Service Commission affirmed its prior decision that Mr. Burke was not totally disabled for useful and efficient service in the duties of his position. Mr. Burke returned to duty on July 19, 1965, and transferred to the Newark Air Force Station at Newark, Ohio, on or about August 1, 1965.

Mr. Burke takes the position he was not responsible for filing the application for disability retirement due to the physical pain he was suffering at the time. He urges that as a result of such "involuntary and coerced" act he was placed in a nonpay status which resulted in the foreclosure action causing the loss of his home.

The settlement certificate disallowing Mr. Burke's claim issued on August 6, 1973, by our Transportation and Claims Division pointed out that the Back Pay Act of 1966--5 U.S.C. 5596--provides in substance that an employee of an agency who, on the basis of an administrative determination or timely appeal, is found by appropriate authority to have undergone an "unjustified or unwarranted personnel action" resulting in a withdrawal or reduction of pay, is entitled upon correction of that action to all of the pay, allowances, and differentials he would have received if the improper personnel action had not occurred. The claim was disallowed since there was no finding in the record of such determination and that there was no legal basis for the allowance of the claim for the loss of the home.

Although the administrative report on Mr. Burke's claim is silent as to his application for disability retirement, we point out that 5 U.S.C. 8337(a) provides that an employee who completes 5 years of civilian service and is found by the Civil Service Commission to have become disabled shall be retired on his own application or on application by his agency. Had the agency desired to seek Mr. Burke's separation due to disability on an involuntary basis it could have done so

under section 8337(a). In the latter case the employee could be held to be entitled to back pay for periods of involuntary leave without pay if the application for disability retirement was not approved by the Commission. However, it would be necessary for the employee to show that he was involuntarily placed on leave and was ready, willing and able to work during such period of such leave to establish his entitlement to back pay. Seebach v. United States, 182 C. Cls. 342, 352 (1968).

In the instant case Mr. Burke submitted no evidence to show that he was ready, willing and able to work during the period involved. The record shows that during the month of October 1964 he was in the hospital which would evidently preclude establishing a work capability. Mr. Burke does not allege that he was ready, willing and able to return to his position after his medical discharge through May 5, 1965. His return to duty on May 6, 1965, and refusal to return to his prior position appears to preclude a finding that he was ready, willing and able to work at that time. Moreover, this refusal appears to indicate that at no time was Mr. Burke willing to return to his former position prior to such refusal. It also follows that the agency request of May 11, 1965, to the Civil Service Commission seeking reconsideration of its decision does not appear to be the causal factor extending the period of Mr. Burke's absence from duty.

Since the record fails to show that Mr. Burke's absence on leave was involuntary and that he was ready, willing and able to work during such period, there is no basis for allowing back pay under 5 U.S.C. 5596. Also, we are unaware of any legal basis that would permit reimbursement of his loss due to foreclosure of the mortgage on his home. Accordingly, the disallowance of Mr. Burke's claim is affirmed.

R.F.KELLER

Deputy Comptroller General
of the United States