

# DECISION



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

FILE: E-184522

DATE: MAR 16 1976

MATTER OF:

- Claim for backpay and  
recredit of leave

DIGEST:

1. Employee was placed on involuntary sick leave pending action on agency-filed application for disability retirement. Application was disapproved by Civil Service Commission (CSC) initially and again after two agency appeals. Employee is not entitled to backpay and restoration of leave from date she was placed on leave to date CSC initially denied application since agency action was in accordance with CSC regulations and was not an unjustified or unwarranted personnel action when based upon competent medical findings.
2. Employee, who was placed on involuntary sick leave pending action on agency-filed application for disability retirement, was continued on involuntary leave while agency appealed initial Civil Service Commission (CSC) denial of application. Employee is entitled to backpay and restoration of leave from date of initial CSC denial to date she was restored to active duty. Agency was obligated either to restore her to active duty or to take action to separate her pending agency's appeal of CSC determination that employee was not totally disabled.

This action is a reconsideration of the denial on May 30, 1975, by our Transportation and Claims Division, of the claim of Miss [redacted] for backpay and restoration of leave for the 18-month period she was placed on involuntary leave pending a decision on the agency-filed application for her disability retirement. Her claim was disallowed on the ground that the action of her employing agency of placing her on involuntary leave was not arbitrary or capricious so as to constitute an unwarranted or unjustified personnel action under 5 U.S.C. § 5596 (1970), even though the Civil Service Commission (CSC) ultimately denied the application for disability retirement.

The record indicates that both before and after the period of involuntary leave, Miss \_\_\_\_\_ was employed as a chemist by the Veterans Administration Hospital, Philadelphia, Pennsylvania. On September 6, 1972, Miss \_\_\_\_\_'s supervisor informed Hospital officials that her continued employment in his laboratory constituted an immediate threat to her personal well-being. Miss \_\_\_\_\_ was counseled by the Associate Chief of Staff of the Hospital and was offered reassignment to two other positions, but she declined both positions. The Hospital Director then notified Miss \_\_\_\_\_ on September 7, 1972, that, based upon the medical recommendations of her supervisor and the Associate Chief of Staff (both of whom were physicians), she was being placed on involuntary sick leave while the agency filed an application for her disability retirement.

The administrative report states that Miss \_\_\_\_\_ refused to undergo a fitness for duty examination at the Hospital, but that she was examined by private physicians. The agency, based upon the case file and the report of the private physicians, reached a tentative determination that the deficiencies in her service were caused by illness and that she met all the requirements to be retired for disability. After receiving Miss \_\_\_\_\_'s answer to the agency's notice of tentative determination, the agency decided to file an application for disability retirement on her behalf with the CSC on November 8, 1972.

The record indicates further that the Bureau of Retirement, Insurance, and Occupational Health of the CSC disallowed the agency's application in a letter to the agency dated March 6, 1973, and denied the agency's appeal in a letter dated April 12, 1973. The agency then appealed to the Philadelphia Regional Office of the CSC which affirmed the decision of the Bureau, and the agency finally appealed to the Board of Appeals and Review of the CSC. The Board, in a decision dated January 28, 1974, affirmed the decision of the Regional Office that Miss \_\_\_\_\_ had not been shown to be totally disabled for useful and efficient service in the duties of her position within the meaning of the retirement law. In its decision, the Board noted that there had been "many difficulties" involving Miss \_\_\_\_\_ and numerous personnel in the agency and that the psychiatrist who evaluated her had stated that she needed professional help. However, the Board stated that there is no provision for retirement for a partial disability, and thus, the application was denied. Miss \_\_\_\_\_ was returned to active duty in a new position at the Hospital on March 14, 1974.

Miss \_\_\_\_\_' claim for backpay and restoration of leave lost during the 18-month period between September 7, 1972, and March 14, 1974, was denied by our Transportation and Claims Division. On appeal she stated that the basis for her appeal is contained in Federal Personnel Manual (FPM), chapter 550, subchapter 8, which describes the Back Pay Act, 5 U.S.C. § 5596 (1970), and the appropriate regulations of the CSC as contained in 5 C.F.R. Part 550, Subpart K (1975).

Under the authority of 5 U.S.C. § 8337(a) (1970), an employee who is found by the CSC to have become totally disabled shall be retired on his own application or on an application filed by his agency. The CSC regulations for an agency-filed disability retirement are contained in 5 C.F.R. Part 831, Subpart L (1975) and in FPM Supplement 831-1, Subchapter 10-10. The procedures for an agency-filed disability retirement are quite elaborate, and it appears from the record that the agency complied with all required procedures in submitting the application to CSC. With regard to the employee's duty status while the application is pending, the regulations provide, in FPM Supp. 831-1, 810-10a:

"(6) Duty Status. The agency is required to retain an employee in an active-duty status pending decision of the Bureau of Retirement, Insurance, and Occupational Health on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his consent, or without his consent when the circumstances are such that his retention in an active-duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay must be effected in accordance with applicable laws, Executive orders, and regulations." (Emphasis added.)

The Back Pay Act, 5 U.S.C. § 5596 (1970), provides, in pertinent part:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

¶(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

¶(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation."

The CSC has promulgated regulations under the Back Pay Act which read in pertinent part as follows:

"(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

"(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay, allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions,

furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter." 5 C.F.R. 550.803 (d) and (e) (1975).

This Office has long held that an employee may be placed on involuntary leave while an agency-filed disability retirement application is pending before the CSC when administrative officers determine, upon the basis of competent medical findings, that an employee is incapacitated for the performance of his assigned duties, and such action does not, under these circumstances, constitute an unjustified or unwarranted personnel action under 5 U.S.C. § 5596 (1970). 41 Comp. Gen. 774 (1962); B-181313, February 7, 1975. Such action is also in accordance with CSC regulations. 5 C.F.R. § 831.1206 (1975) and FPM Supp. 831-1, S10-10a(6).

The Court of Claims has held that Government employees who are placed in an involuntary leave status for medical reasons are entitled to recover lost compensation when it is shown that the employees were ready, willing and able to perform their duties and were not, in fact, medically incapacitated at the time they were placed on leave. Kleinfelter v. United States, 318 F. 2d 929 (Ct. Cl. 1963); Seebach v. United States, 182 Ct. Cl. 342 (1968). However, in both of these cases the Court viewed the CSC's determination that the employee was not totally disabled as a retroactive determination regarding the fitness for duty of the employee at the time he was placed on involuntary leave. In this case, although Miss \_\_\_\_\_ was ultimately determined not to be totally disabled, there has been no authoritative determination that she was not disabled at the time she was placed on involuntary leave. Further, there is no indication that the medical advice in the first instance was improper or not based on good judgment, in which case the later rejection of such advice could be regarded as correcting an improper personnel action. Therefore, there is no legal basis upon which to allow backpay and to restore leave lost for the period from the date on which Miss \_\_\_\_\_ was placed on involuntary leave (September 7, 1972) to the date the agency's application was denied by the Bureau of Retirement, Insurance, and Occupational Health (March 6, 1973).

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The agency appealed the Bureau's denial as authorized under 5 C.F.R. § 831.1203 (1975), but the agency took no action regarding the employee's duty status. We have held that when an agency-filed application is denied and the agency appeals, it is incumbent upon the agency to either restore the employee to active duty or initiate steps to separate the employee on the grounds of disability, and the failure to do so constitutes an unwarranted or unjustified personnel action under 5 U.S.C. § 5596 (1970). See 41 Comp. Gen. 774, at 777 (1962); E-151072, May 14, 1963; and E-148343, May 7, 1963.

Accordingly, Miss \_\_\_\_\_ is entitled to backpay and restoration of leave under the authority of 5 U.S.C. § 5596 for the period from March 6, 1973, to March 14, 1974.

R. F. KELLER

{ Deputy } Comptroller General  
of the United States