

DOCUMENT RESUME

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[Backpay and Recredit of Leave]. B-181313. May 6, 1977. 4 pp.

Decision re: William J. Heisler; by Paul G. Desbling, Acting Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Defense Supply Agency: Defense General Supply Center, Richmond VA.

Authority: 5 U.S.C. 5596. 41 Comp. Gen. 774.

Reconsideration was requested of a decision which disallowed a claim for backpay and recredit of sick and annual leave. An employing agency cannot be held responsible for the failure of the employee's physicians and State-operated laboratories to conduct required tests within a normal time period. The agency's decision not to permit the employee to work until tests were completed was based on competent medical evidence and was proper. (Author/SC)

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DECISION



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

Faulkner
Civ Pers.

FILE: B-181313

DATE: May 6, 1977

**MATTER OF: William J. Heisler - Backpay - Recredit of
Leave**

DIGEST: Where preliminary diagnosis of tuberculosis was made by employee's personal physician, employing agency properly declined to permit employee to work while confirmatory tests were being made. Agency's decision was based on competent medical evidence supplied by employee's own physician and doctor at Veterans Administration where employee sought treatment. Employing agency cannot be held responsible for failure of employee's treating physicians and state operated laboratories to conduct required tests within normal time period. Conduct by these individuals does not constitute an unjustified and unwarranted personnel action by employee's agency.

This decision is in response to a request by Mr. William J. Heisler for reconsideration of our decision Matter of William J. Heisler, B-181313, February 7, 1975, which disallowed his claim for backpay and for recredit of sick and annual leave.

In October 1971 Mr. Heisler was employed as a plumber at the Defense General Supply Center (DGSC) in Richmond, Virginia. On October 8, 1971, Mr. Heisler was admitted to St. Luke's Hospital under the care of his personal physician, Dr. Allston G. Ballie. Mr. Heisler remained in the hospital until October 10. While he was hospitalized bronchial washings and sputum smears were taken from Mr. Heisler. Mr. Heisler returned to work on October 12. On October 14, microscopic examination of the bronchial washings and sputum smears revealed the presence of "acid fast bacilli," which indicates a strong possibility that the individual has tuberculosis. The final diagnosis can only be made by growing cultures from the bacilli. Following receipt of this information, Mr. Heisler stopped working and did not again work at the DGSC until January 19, 1972.

On October 28, 1971, Mr. Heisler was admitted to McGuire Veterans Administration Hospital, Richmond, Virginia, for further observation. While Mr. Heisler was hospitalized there, three more

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sputum smears were taken which proved to be negative for "acid fast bacilli." Following Mr. Heisler's discharge from McGuire on November 2 Dr. Robert P. Moore, a staff physician in the pulmonary disease section, stated in his discharge summary that:

"I would see no reason why this man might not return to work while we are awaiting cultures if he is permitted to do so."

The above statement forms the basis for Mr. Heisler's request for reconsideration.

On November 4, 1971, Mr. Heisler was examined by Dr. John M. Birchette of the DGSC Clinic. In the notes of his examination it is indicated that Dr. Birchette talked to Dr. Moore at McGuire apparently on that day. The notes indicate that Dr. Moore told Dr. Birchette that four sputum smears were negative for acid fast bacilli, but one smear was positive. The notes also show that organisms had not yet grown out of the acid fast bacilli cultures. Dr. Birchette's notes for November 4 conclude by stating that Mr. Heisler should not work for 6 to 8 weeks while the cultures are incubating. There is nothing to indicate that Dr. Birchette took any sputum smears or bronchial washings. All the evidence in the record before us indicates that Dr. Birchette relied on the tests begun by Dr. Bailie and/or Dr. Moore. The sputum smears and bronchial washings had been sent to the Richmond City and Virginia State Health Department Laboratories for the growing of the cultures.

Mr. Heisler exhausted his annual and sick leave as of October 22, 1971, and was on leave without pay from that day until he returned to work on January 19, 1972. The notes of Mr. Heisler's examination at the DGSC Clinic on January 18, 1972, indicate that all the cultures were negative, and seem to indicate that Dr. Moore stated that he had recommended that Mr. Heisler be returned to duty a long time ago.

In order to recover backpay under 5 U.S.C. § 5598 (1970), it must be found that an employee has undergone an unjustified or unwarranted personnel action. We find no basis for such a finding in this case. The physicians that Mr. Heisler saw to diagnose and treat his illness were physicians of his own choosing. The laboratories involved were not controlled by Mr. Heisler's employing agency. The doctors at the DGSC did not conduct independent tests, but relied on the tests and examinations performed by physicians chosen by Mr. Heisler.

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As stated in our February 7, 1975, decision in this case:

"The general rule applied by our office is that an employee may be placed on leave without his consent when administrative officers determine, upon the basis of competent medical findings, that the employee is incapacitated for the performance of his assigned duties, and that the involuntary leave does not, under such circumstances, constitute an unjustified or unwarranted removal or suspension without pay within the meaning of the back pay provisions of the applicable statutes. 41 Comp. Gen. 74 (1962)."

Here the medical findings that led to the decision not to permit Mr. Heisler to work were the microscopic findings of acid fast bacilli in the sputum smears and bronchial washings taken by Dr. Bailie and/or Dr. Moore. In a review of Dr. Moore's clinical summary, and the rest of the record, Dr. Ellis N. Zuckerman, Medical Officer of the Army Health Clinic at the DGSC, states that a finding of acid fast bacilli, as was found here, is usually tantamount to a diagnosis of tuberculosis, and that the only way a more definitive diagnosis can be obtained is through growing cultures from the bacilli for a period of 6 to 8 weeks. There is nothing in the record that contradicts this opinion. Additionally, we informally discussed this matter with our own medical consultant. He agreed that after a microscopic finding of acid fast bacilli it is necessary to attempt to grow cultures to make the final diagnosis. He also agreed that it was proper to exclude Mr. Heisler from work while the cultures were growing.

The record consistently states that 6 to 8 weeks should be allowed for the growth of the cultures. However, here the cultures were taken in early October 1971 with the final results not reported until January 5, 1972. Because these cultures were taken by physicians chosen by Mr. Heisler, and were sent to laboratories controlled by the City of Richmond and Commonwealth of Virginia, we cannot hold Mr. Heisler's employing agency responsible for any delay or dilatory handling of the tests. Neither the physicians nor the laboratories were agents of the employing agency. Therefore, their conduct cannot form the basis for an unjustified or unwarranted personnel action.

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Accordingly, our original disallowance of Mr. Heisler's claim for backpay and recredit of leave is sustained.

Paul B. Leubling
Acting Comptroller General
of the United States