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**DECISION**



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

FILE: B-200015

DATE: November 17, 1980

MATTER OF: Frederick W. Merkle, Jr. <sup>Entitlement to</sup> Administrative Leave <sub>]</sub>

DIGEST: (1) Employee, who voluntarily took leave without pay (LWOP) to preserve possible eligibility for early retirement pending determination of creditable service, returned to duty 42 workdays later after being found ineligible. His request that LWOP be changed to administrative leave because he was misled by agency's errors must be denied since there is no authority for administrative leave for such purpose or extended period.

(2) Employee who voluntarily takes LWOP to preserve possible eligibility for early retirement, knowing there is a question about his eligibility, is not entitled to backpay under 5 U.S.C. 5596 when he is found ineligible since there has been no unjustified or unwarranted personnel action.

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By letter dated July 21, 1980, Ms. Barbara B. Burdge, Acting Personnel Office of the Social Security Administration (SSA), requested a ruling whether Frederick W. Merkle, Jr. may have excused absence with pay - administrative leave - substituted for the 42 workdays he was on leave without pay (LWOP) pending a decision as to his eligibility for discontinued service retirement.

In July 1979, Mr. Merkle was notified by his employing agency, SSA, that he had sufficient creditable Federal service to be eligible for discontinued service retirement.

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Mr. Merkle chose to take advantage of this early-out retirement, requesting a separation date of December 31, 1979, the last day the SSA had the authority to approve such a form of retirement.

In preparing Mr. Merkle's retirement records for transmission to the Office of Personnel Management (OPM) it was discovered that some of the service he claimed had not been verified and that an error had been made in computing his service computation date. Mr. Merkle was informed on or about December 19, 1979, that there was a question about his eligibility for retirement. He was advised that, since a final determination could not be made before SSA's authority expired, he could elect to go on LWOP until the matter was resolved, and thereby preserve the availability of early-out retirement. See Federal Personnel Manual Supplement 831-1, S9-2b(4)(b).

Mr. Merkle went on LWOP January 1, 1980, and did not return to work until March 3, 1980, after being informed that he was ineligible for discontinued service retirement. He then submitted a claim for compensation for the 2 months that he was on LWOP. It is his contention that he was misled to his detriment by the errors and erroneous advice of SSA and that his LWOP should be changed to excused absence with pay or administrative leave.

There is no general statutory authority for what is popularly referred to as administrative leave which is excused absence from duty without loss of pay and without charge to other paid leave. Nevertheless, it has been recognized that heads of agencies in appropriate circumstances have limited authority to grant such leave for brief periods of time in accordance with general guidelines established by decisions of the Comptroller General, Executive orders, and instructions of the Office of Personnel Management in Federal Personnel Manual Supplement 990-2, Book 630, subchapter S 11. Some of the more common situations in which administrative leave is generally authorized include registering and voting, participating in civil defense activities, and donating blood. However, we find no authority for granting such leave to an employee for an extended period of time for the

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purpose of retroactively correcting an alleged error of his agency. See 53 Comp. Gen. 1054 (1974) and B-189773, November 3, 1977. Accordingly, Mr. Merkle is not entitled to administrative leave for the 42 workdays he was on LWOP.

Moreover, Mr. Merkle is not entitled to compensation for the period here involved under the Back Pay Act, 5 U.S.C. 5596 (1976). The Back Pay Act provides that an employee who is found by appropriate authority to have been affected by an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or part of his pay, allowances, or differentials is entitled to recover the amount he would have received if the personnel action had not occurred. An unjustified or unwarranted personnel action is an act of commission or omission which violates or improperly applies the requirements of a nondiscretionary provision. 5 C.F.R. 550.802(c) (1980). A nondiscretionary provision is any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria. 5 C.F.R. 550.802(d) (1980).

While SSA was remiss in failing to timely verify Mr. Merkle's creditable service, in improperly computing his service computation date, and in erroneously advising him initially that he was eligible for early retirement, the errors were discovered and he was informed of them before he went on LWOP. Mr. Merkle voluntarily placed himself in LWOP status with knowledge that there was a question about his eligibility for early retirement. In these circumstances there was no unwarranted or unjustified personnel action and consequently there is no entitlement to backpay under 5 U.S.C. 5596. B-174199, December 14, 1971; B-166180, April 21, 1969.

Accordingly, Mr. Merkle's claim for compensation for the period he was on LWOP must be denied.

*Harry R. Van Cleave*  
For The Comptroller General  
of the United States