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DECISION



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

FILE: B-195597

DATE: July 6, 1981

MATTER OF: Involuntary Leave and Leave Without Pay -
Agency-Filed Application for Disability
Retirement

DIGEST:

Agency placed employee on involuntary leave and leave without pay pending Civil Service Commission's action on agency-filed application for disability retirement. Employee claims restoration of leave and backpay since Commission denied retirement application. Agency's placing employee on involuntary annual leave and leave without pay was not an unjustified or unwarranted personnel action where the agency's action was based on results of psychiatric evaluation. Record as a whole shows no reason why agency should not have relied on such competent medical evidence.

By letter dated July 9, 1980, the Naval Supply Center, Oakland, California, appealed the determination of our Claims Group dated May 16, 1980, that a civilian employee at a Naval Supply Center was entitled to backpay together with the recredit of any annual leave used during the period November 18, 1977, through September 2, 1978, while she was on involuntary leave and leave-without-pay status pending a decision on an agency-filed application for her disability retirement. Upon consideration of additional facts presented by the Center, the determination by the Claims Group is reversed.

The record shows that the employee, a computer operator, grade GS-7, was advised in September 1976 that she would be involuntarily reassigned from Shift II to Shift III, duty hours 11:30 p.m. to 8 a.m. The employee advised the Center that she would be unable to work on Shift III due, in part, to health problems. The agency deferred her reassignment until October 11, 1976, to provide her with the opportunity to resolve her hardship. Beginning October 12, 1976, the employee, at her request, was on extended sick leave and leave without pay for medical reasons. The employee reported for duty on April 4, 1977, and at that time presented medical information which indicated that she was able to return to duty on only the day shift. The employee had submitted a letter dated March 23, 1977, from a psychiatric social worker who was involved in her treatment wherein

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it was stated that the employee's emotional problems had been improved by medication and psychotherapy and recommended that for continued medical health, she not be given any rotating shifts or be placed under undue pressure.

A fitness for duty examination on April 8, 1977, indicated that the employee was able to return to duty for only the day shift. The record before the Claims Group showed that on April 19, 1977, the employee was advised that beginning April 25, 1977, her shift assignment would be deferred for 90 days at which time her condition would be reevaluated by one or more qualified physicians. She was advised to report for duty beginning April 25, 1977, on Shift I, 7:30 a.m. to 4 p.m., Thursday through Monday. However, the record showed neither the nature nor the overall duration of her transfer to Shift I.

In September 1977 the employee was directed by the agency to report to a psychiatrist for a psychiatric evaluation to determine if she could function as a computer operator on Shift III. The employee was examined on or about September 19, 1977, and the psychiatrist determined in part that she was temporarily totally disabled to function in her position or in any other remunerative position. The Director of the Operations Division, Data Processing Department, advised her by memorandum that based on the psychiatric report she would be placed on leave effective November 18, 1977. Upon the exhaustion of the limited annual leave available to the employee the agency placed the employee on leave without pay.

On December 5, 1977, the agency advised the employee that, as advised at a counseling session on November 3, 1977, she could apply for a disability retirement and that if she refused the agency would file such an application on her behalf. After allowing her time to appeal its determination, the agency advised the employee on January 25, 1978, that a disability retirement application was being filed on her behalf with the Civil Service Commission (now the Office of Personnel Management).

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On August 23, 1978, the employee was advised by the Naval Supply Center that the agency-filed application for the disability retirement had been disapproved because total disability for useful and efficient service in her position had not been shown by the medical evidence. The employee was restored to duty as a computer operator on Shift II effective September 3, 1978.

On December 6, 1978, the employee filed a claim with our Claims Group for restoration of leave and backpay incident to her being placed on involuntary leave and leave without pay during the period from November 18, 1977, to September 3, 1978.

This Office has long held that an employee may be placed on leave without his consent while an agency-filed disability retirement application is pending before the Civil Service Commission when administrative officers determine, based upon competent medical findings, that the employee is incapacitated for the performance of his assigned duties, and such action does not, under the circumstances, constitute an unjustified or unwarranted removal or suspension without pay within the meaning of the backpay provisions of the applicable statute. 41 Comp. Gen. 774 (1962); Dora M. McDonald, B-184706, January 12, 1976. We note that a subsequent determination by the Civil Service Commission that an employee was not totally disabled and therefore not eligible for disability retirement does not create a right to leave restoration and backpay where the medical findings relied on by the agency have not been overturned. See [REDACTED], March 16, 1976, and April 21, 1977.

On the basis of the record before it the Claims Group determined that at the time the employee was placed on involuntary leave and leave without pay there was an unresolved conflict in medical opinion regarding the employee's ability to continue working. As set forth above, in her letter dated March 23, 1977, the psychiatric social worker stated that the employee's emotional problems had improved and recommended that for continued mental health she be placed in a new department and not be given any rotating shifts or be

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placed under undue pressure. In addition, by letter dated September 22, 1977, a private physician stated in a letter to the Naval Supply Center dispensary that he had been treating the employee since August 15, 1977, and that he believed that the employee's primary problem was one of job-related anxiety and suggested the employee be transferred to another area where she could function more comfortably. The Claims Group stated that while the psychiatric opinion in itself may have been considered competent medical evidence, the record as a whole did not provide a full justification for the agency's action. Accordingly, the Claims Group determined that the Naval Supply Center should have acted to resolve the conflict in medical opinions before it placed her on involuntary leave and leave without pay. Thus, the Claims Group found that the agency action constituted an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, which entitled the employee to backpay and the recredit of leave used for the period she was on involuntary leave and leave without pay.

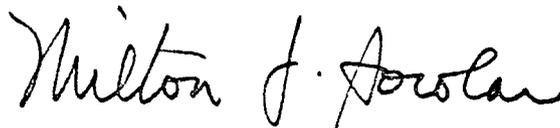
In its appeal of the Claims Group's settlement action the Naval Supply Center provided this Office with additional documentation concerning the circumstances of the employee's being placed on involuntary leave and leave without pay.

A Standard Form (SF) 52 and attachment thereto show that effective April 25, 1977, the employee was detailed for 90 days to Shift I to perform the duties of the position of computer aid, grade GS-5. The duties of this position were to maintain the computer tape library. A subsequent SF-52 shows that effective July 24, 1977, this detail was extended. Although section F of the latter SF-52 states that the extension of the detail was for 2 weeks or when the final determination of fitness for duty was made, whichever occurred sooner, we have been advised by the Naval Supply Center that the employee continued to serve on detail to Shift I as a computer aid until November 18, 1977, when she was placed on involuntary leave and leave without pay. This information is consistent with the employee's statement in the file dated November 27, 1978, wherein she asserts in part that she was working "in the Library" until November 17, 1977.

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Thus, it is now clear that throughout the period the employee occupied a Shift I job which involved little stress. Upon prior consideration by the Claims Division it appeared that she was working in her computer operator, Shift III or Shift II position during that time.

In the light of the facts now before us, we can no longer conclude that the letter from the psychiatric social worker of March 23, 1977, together with the evaluation of the private physician dated September 22, 1977, created such an unresolved conflict in medical opinion regarding the employee's ability to continue to work so that placing her on involuntary leave and leave without pay was improper. Notwithstanding that the employee had been detailed to a lower grade position on Shift I since April 25, 1977, the private physician who had been treating her since August 15, 1977, found that she was suffering from "job related anxiety." Although the private physician's opinion may have differed from the psychiatric evaluation of September 1977 regarding the extent of the employee's disability, in view of the circumstances, it appears that there was not any conflict in medical opinion regarding the employee's ability to work as a computer operator. We now see no reason why the Naval Supply Center should have questioned the accuracy of the psychiatrist's findings. Accordingly, we conclude that the agency's action in placing the employee on involuntary leave and leave without pay subsequent to receiving the psychiatrist's evaluation in October 1977 was based on competent medical evidence and thus did not constitute an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596. Accordingly, the settlement by our Claims Group of May 16, 1980, is hereby reversed.



Acting Comptroller General
of the United States