

117820

**DECISION**



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

21147

**FILE:** B-205452

**DATE:** March 15, 1982

**MATTER OF:** Jimmie D. Brewer - Continuation of Night  
Shift Differential

- DIGEST:**
1. Department of the Air Force Wage Grade employee regularly assigned to a swing shift was reassigned to the day shift. The determination of whether reassignment to a particular tour of duty is temporary for the purpose of continuing entitlement to night shift differential is a matter for determination by the agency. Such a determination is a factual one, and where the agency's characterization appears to be reasonable, we are not in a position to substitute our judgment for that of the agency. The facts in this case indicate that the agency's determination was a reasonable one, and the employee has presented no evidence to indicate that his transfer was only temporary.
  2. The Department of the Air Force reassignment of a Wage Grade employee to a different position was not improper, even if an agency-filed disability retirement application had been pending, as applicable regulations only require the agency to retain the employee in an "active duty status" in such a case. Further, the loss of premium pay for nightwork by assignment to the day shift is not such a reduction in pay as will constitute an adverse action under the Back Pay Act, 5 U.S.C. § 5596.

This decision is in response to an appeal to the settlement of our Claims Group in the case of Mr. Jimmie D. Brewer, a former Wage Grade employee with the Department of the Air Force. Mr. Brewer's original claim, Z-2833019, was for GAO to "take action on all my claims against my former employer Tinker Air Force Base (AFB), Oklahoma, and the U.S. Department of Labor." Mr. Brewer has alleged the existence

of a number of improprieties regarding the following: (1) his reassignment while a disability retirement was pending in 1974; (2) his assignment to a day shift from a swing shift in 1975, and subsequent loss of night shift differential; (3) computation of his workers' compensation and disability retirement; and (4) payment of physician's bills for injuries alleged to be work related. The last two issues raised by Mr. Brewer are outside the jurisdiction of this Office. However, the first two of Mr. Brewer's claims are within our jurisdiction. We have carefully considered these two claims and have found them not to be meritorious. For the following reasons, we affirm the action of our Claims Group in denying Mr. Brewer's claims.

#### NIGHT SHIFT DIFFERENTIAL

A Wage Grade employee regularly assigned to a night shift who is "temporarily" assigned to the day shift is entitled to have his night shift differential continue during that temporary period. Federal Personnel Manual (FPM) Supplement 532-1, Subchapter S8-4c(3)(iii). Mr. Brewer claims that until April 5, 1975, he had been regularly assigned to the swing shift in his position of aircraft jet engine assembler, Wage Grade 9, but that on April 6, 1975, he was "loaned" to the day shift. The Air Force, on the other hand, has taken the position that Mr. Brewer's reassignment was not "temporary" within the meaning of FPM Supplement 532-1, Subchapter S8-4c(3)(iii).

In general, this Office has considered that the determination of whether reassignment to a particular tour of duty is "temporary" for the purpose of continuing entitlement to night shift differential is a matter for determination by the agency. See B-175957, July 27, 1972. Such a determination is a factual one, and where the agency's characterization appears to be reasonable, we are not in a position to substitute our judgment for that of the agency. In the present case, we believe that the agency's determination is a reasonable one.

It appears from the record that at the time Mr. Brewer was reassigned from the swing shift to the day shift, he was undergoing a recurrence of medical problems arising from a previous work-related injury. Following his reassignment, Mr. Brewer continued as a day shift employee

for more than 2 years, although during this time he spent at least three substantial periods in leave without pay status, while receiving workers' compensation. The record shows that the unit for which he worked at the time he was reassigned to the day shift had no Wage-Grade employees permanently assigned to the swing shift, a fact which alone supports the agency's position that his reassignment was not temporary. In addition, Mr. Brewer's own job description makes it clear that he was at all times subject to change of duty hours at the discretion of his supervisors.

In his appeal, Mr. Brewer says that this Office took the word of the Air Force only and was not interested at all about what the real truth might be. With regard to such factual disputes, we have held that we must of necessity base our decisions on the factual information furnished by the claimants and the reports obtained from agencies. Our Office has no duty to refute a claim, or to refute the allegations underlying a claim. On the contrary, one who asserts a claim has the burden of furnishing sufficient evidence to clearly establish his right to payment. 4 C.F.R. § 31.7 (1981). When disputed questions of fact arise between a claimant and the administrative officers of the Government, it is the long-established rule of accounting officers to accept the statements of facts furnished by the administrative officers, in the absence of convincing evidence to the contrary. Alfred W. Cahman, B-185736, December 28, 1976. Mr. Brewer has not furnished any evidence to indicate that his transfer was only temporary. Further, the fact that Mr. Brewer continued in a day shift position until his retirement in 1977, confirms the accuracy of the agency's characterization.

#### BACKPAY

A number of Mr. Brewer's claims stem from what he alleges to have been improper personnel actions in changing his assignments (including his reassignment to the day shift) during a period in which an agency-filed disability retirement application was pending. Although not specifically phrased as such, we shall treat Mr. Brewer's allegations as a claim for backpay due to an unjustified personnel action under 5 U.S.C. § 5596 (1976).

Mr. Brewer asserts that "the regulations state an employee who is under a retirement action will remain in his

same job, grade, and salary until that action is resolved." Mr. Brewer has provided no evidence to support his assertion that a retirement action was actually pending (in fact, elsewhere he indicates that his supervisor had simply requested the agency to initiate such an action). However, even had he done so, we have examined the appropriate regulations and have found nothing to support his statement of the law. Subchapter S10-10a(6) of FPMR Supplement 831-1 governs the actions which an agency may take while an agency-filed application for disability retirement is pending. That provision states:

"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 or her consent, or without consent when the circumstances are such that 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, fellow workers, or the general public." (Emphasis added.)

See also paragraph 8(c) of Air Force Regulation 40-831 (December 19, 1975). The requirement that the agency retain the employee in an active-duty status is not a requirement that the employee be maintained in the same "job, grade, and salary" or in the same specific position he was in before the retirement action was initiated. In certain disability retirement cases any such restriction placed on the agency's ability to transfer employees to different positions could endanger the safety of other workers.

In the present case, the agency acted within the requirements of the applicable regulations. Mr. Brewer was retained in an active-duty status while retirement action was pending, except for periods of leave without pay while he received workers' compensation. In fact, Mr. Brewer's grade and salary were not diminished during this period, except for the loss of night shift differential when reassigned to the day shift.

Finally, we also note that, as regards the agency's decision to place Mr. Brewer on the day shift, Subchapter S1-5 of FPM Supplement 752-1 specifically provides that the loss of premium pay for nightwork by assignment to the day shift is not such a reduction in pay as will constitute an adverse action under the Back Pay Act, 5 U.S.C. § 5596. Subsection (c) reads in part as follows:

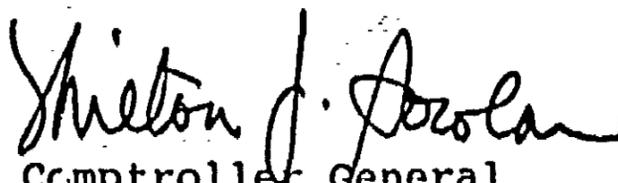
"c. Reductions in pay not covered by part 752. The following are examples of actions that are not reductions in pay under part 752.

\* \* \* \* \*

"(4) Loss of premium pay for night work. The assignment of an employee from a night shift to the same or an identical position on the day shift and the attendant loss of premium pay for night work is not a reduction in pay covered by part 752 \* \* \*."

See also our decision B-175957, July 27, 1972, previously cited.

Accordingly, we conclude that there is no basis for reimbursement of Mr. Brewer's claims for continuation of night shift differential and for backpay.

for   
Comptroller General  
of the United States