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DECISION

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

FILE: B-206237 DATE: August 16, 1982

MATTER OF: David G. Reyes - Claim for backpay and restoration of leave

DIGEST: 1. Employee was placed on involuntary leave because of medical opinion that he was incapable of performing some of the duties of his position, and Department of the Army subsequently applied for employee's disability retirement. From date he was placed on leave to date of Office of Personnel Management's (OPM) decision to deny application for disability retirement, employee is not entitled to backpay and restoration of leave. The Army's placement of the employee on involuntary leave was not an unjustified or unwarranted personnel action in that it was based on the medical determination that the employee was incapacitated for duty.

2. From date of denial of application for disability retirement by OPM to the day before the employee returned to active duty, however, the employee is entitled to backpay and restoration of leave because as of the former date, the Army had an obligation either to restore the employee to active duty or to take steps to separate him on grounds of disability. The failure to do either constituted an unwarranted or unjustified personnel action under 5 U.S.C. § 5596 (1976).

Mr. David G. Reyes, requests reconsideration of our Claims Group's denial of his claim for backpay and restoration of leave for the period from January 21, 1979, to May 8, 1980, during which time he was involuntarily placed on leave by the Department of the Army. For the following reasons, we will deny his claim for the period from January 21, 1979, to March 26, 1980, and we will grant his claim for the period from March 27, 1980, to May 8, 1980.

Mr. Reyes holds the position of Motor Vehicle Operator, WG-5703-07, at Fort Sam Houston, Texas. On June 30, 1978,

he was injured in the course of his employment. On December 22, 1978, he was examined by a Medical Doctor at the Brooke Army Medical Center to determine his suitability to continue as a motor vehicle operator, and was found to be not physically capable of performing the full range of duties of his present position. Specifically, he was found to be unable to do any lifting and carrying of items in excess of 50 pounds, and only limited lifting of items in excess of 20 pounds.

On the basis of this examination, the Occupational Health Officer, Brooke Army Medical Center, recommended on December 27, 1978, that Mr. Reyes be separated as medically unfit to continue in his motor vehicle operator position, but also recommended that he be reassigned to another position commensurate with his physical limitations. The only other position available at that time which was compatible with his physical limitations was that of Food Service Worker, WG-7408-03. On January 11, 1979, Mr. Reyes was offered this position, and on January 15, 1979, the Occupational Health Officer recommended that he be reassigned to it noting that the new job description appears to reflect his chronic duty restriction.

On January 18, 1979, Mr. Reyes informed officials of the Civilian Personnel Office that he did not want to accept reassignment to the Food Service Worker position. In a letter dated January 26, 1979, the Chief, Terminal Operations informed him that it was proposed to separate him from his position because of physical disability, and noted that this proposed separation did not reflect unfavorably upon his character or his willingness to work. After further discussion and correspondence between Mr. Reyes' attorney and Army officials, the Chief, Transportation Division issued a decision March 22, 1979, to separate Mr. Reyes effective March 30, 1979. Mr. Reyes then appealed to the Merit Systems Protection Board, Dallas, Texas on April 11, 1979. Before a hearing could be held, however, the Chief, Transportation Division advised Mr. Reyes in a letter dated April 26, 1979, that the separation action of March 30, 1979, was retroactively cancelled, that his duty status was an enforced sick leave status, and that a tentative determination has been made by the Army that he met all the requirements for a civil service disability retirement. In a decision dated March 27, 1980, the Office of Personnel Management (OPM) disallowed the application because total disability for useful and efficient service in Mr. Reyes' position had not been shown by the medical evidence.

From the record it is clear that the Army placed Mr. Reyes on involuntary leave, which began on or about January 21, 1979. After his sick and annual leave accounts were exhausted, he was placed on leave without pay. The exact dates of the foregoing events are not specified in the record. However, after meeting with Army officials and signing a statement on May 8, 1980, acknowledging that he was able to fully perform the regular duties of his position, and that his return to duty would necessitate termination of his claim with the Office of Workers' Compensation, Mr. Reyes was allowed to return to work on May 9, 1980.

Mr. Reyes contends that he is entitled to backpay and restoration of other benefits commencing on or about January 21, 1979, to May 8, 1980, because he was involuntarily placed on leave by his agency throughout this period even though he was ready, willing, and able to work, and there was no competent medical evidence to support the agency's action.

The Back Pay Act of 1966, 5 U.S.C. § 5596 (1976), provides for backpay where an unjustified or unwarranted personnel action has resulted in the withdrawal or reduction of pay to an employee. However, the placing of an employee on involuntary leave, pending a decision of OPM on an agency-filed application for disability retirement, is not considered to constitute an unjustified or unwarranted action so as to entitle the employee to backpay when the administrative officers determine, upon competent medical evidence, that the employee is incapacitated for the performance of assigned duties. 41 Comp. Gen. 774 (1962); Dora M. McDonald, B-184706, January 12, 1976; William J. Heisler, B-181313, February 7, 1975, affirmed on reconsideration, B-181313, May 6, 1977.

Our discussion of the present case may be conveniently divided into two periods: 1) from January 21, 1979, to March 26, 1980; and 2) from March 27, 1980, to May 8, 1980.

During the first period, the propriety of the agency's actions is determined by 5 C.F.R. § 831.1206 (1978), which provided:

> "An agency shall retain an employee in an active duty status until it receives the

> decision of the Bureau 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 shall be affected in accordance with applicable laws, Executive orders, and regulations."

To the same effect is paragraph S10-10a(6) of FPM Supplement 831-1.

The Army justifiably relied on the Occupational Health Officer's recommendation of December 27, 1978, that Mr. Reyes be separated from his position because of his physical disability to perform his duties. This medical recommendation was based on competent medical evidence, namely, the report from the orthopedic consultation on December 22, 1978. Accordingly, based on the medical examination, the agency could find the necessary elements specified above in order to place an employee on involuntary leave. We note that only under circumstances where the medical findings have been overturned or where there were no medical findings to support the administrative determination has our Office held that the involuntary leave constituted an unjustified or unwarranted personnel action. [redacted] B-184522, April 21, 1977, affirming B-184522, March 16, 1976.

In regard to that part of the first period from March 30, 1979, the date of Mr. Reyes' separation, to April 26, 1979, the date on which the separation was cancelled retroactive to the former date, we note that, under the criteria set forth above, Mr. Reyes would still not have been entitled to backpay and other benefits, even if there had been no separation. Thus, Mr. Reyes has not suffered any additional economic harm due to the separation which was subsequently and retroactively cancelled.

During the second period, however, a different situation is present. On March 27, 1980, OPM denied the Army's application for Mr. Reyes' disability retirement. As of that date, the Army had an obligation either to restore the employee to active duty or to take steps to separate the employee on grounds of disability, and it failed to do either. Such a failure constitutes an unwarranted or unjustified personnel action under 5 U.S.C. § 5596 (1976), as our cases have long held. [redacted] B-184522, previously cited and see 41 Comp. Gen. 774, 777 (1962).

Accordingly, Mr. Reyes' claim for backpay and restoration of leave under the authority of 5 U.S.C. § 5596 (1976) is denied for the period from January 21, 1979, to March 26, 1980, and granted for the period from March 27, 1980, to May 8, 1980.

Milton J. Socolar
for Comptroller General
of the United States