



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Howard L. Bittle

File: B-226946

Date: July 16, 1987

DIGEST

A civilian employee, separated for voluntary retirement, was later restored to the agency rolls because he did not meet the conditions for optional retirement under 5 U.S.C. § 8332(c). The employee now claims backpay for the period he was off the rolls. Under the facts of this case, the employee did not undergo an unjustified or unwarranted personnel action for which backpay is authorized since he was properly informed, prior to his separation, of the requirements for retirement. Even though the agency was aware the employee did not intend to waive his military retired pay, there was a basis for retiring him on the face of his retirement application which stated that his retired pay was for Reserve duty, thus exempting him from the waiver requirement. Therefore, the employee's claim for backpay must be denied.

DECISION

This decision is in response to an appeal submitted by Howard L. Bittle, requesting reconsideration of the Claims Group's determination of February 3, 1987, denying him backpay under 5 U.S.C. § 5596. Mr. Bittle is appealing the determination on the basis that his application for retirement from the General Services Administration (GSA) was accepted by that agency despite the fact that he indicated on his retirement application that he was not willing to waive his military retired pay, a necessary condition for retirement in his case.

Based upon our review of Mr. Bittle's case, we conclude that he received accurate information from the agency concerning the requirements for retirement. GSA processed his retirement application only after Mr. Bittle insisted that he came under a category of employees who are authorized by law to receive a civil service annuity based on their combined military and civilian service, while continuing to receive their military retired pay. GSA learned that Mr. Bittle did

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not belong to this category of employees after he had been removed from GSA's employee rolls. Since Mr. Bittle was not misled or improperly counseled by GSA, the agency did not commit an unwarranted or unjustified personnel action in his case. Accordingly, backpay is not authorized.

BACKGROUND

Mr. Howard L. Bittle, a civilian employee of the GSA, applied for voluntary retirement from federal service effective May 3, 1985. At that time, he was 55 years old with 24 years, 6 months, and 8 days of civilian service plus 7 years, 6 months, and 8 days of military service for a total of 32 years and 16 days of federal service. Mr. Bittle applied for retirement under section 8332(c) of title 5, United States Code. That provision prohibits credit for civil service retirement to be given for military service that serves as a basis for military retired pay, unless the retired pay is based on a disability caused by an instrumentality of war and incurred in the line of duty or the pay is awarded under chapter 67 of title 10 for military Reserve duty. Even if one of these exceptions is not applicable, credit still may be allowed for military service if military retired pay otherwise allowable is waived.

Before processing Mr. Bittle's application for retirement, a GSA employee relations assistant counseled Mr. Bittle concerning his retirement status. The counselor advised Mr. Bittle that he might be required to waive his military retired pay in order to combine his military and civilian service for civil service retirement purposes. Mr. Bittle insisted that his retired pay was for Reserve duty, which exempted him from the waiver requirement. The record indicates that despite further attempts by the counselor to persuade Mr. Bittle that waiver might be necessary in his case, Mr. Bittle maintained that he was eligible to retire and continue receiving military retired pay. Mr. Bittle was separated from GSA on May 3.

GSA forwarded Mr. Bittle's retirement papers to the Office of Personnel Management (OPM) for approval. After Mr. Bittle's retirement application reached OPM, it became clear that his military retired pay was not for Reserve duty. However, Mr. Bittle then insisted that his disability was caused by an instrumentality of war.

According to GSA, on July 16, 1985, the agency was informally notified by OPM that Mr. Bittle's retirement application had been disallowed on the basis that his disability was not caused by an instrumentality of war. On the same date, GSA wrote to Mr. Bittle advising him that OPM had

"disapproved" his application. GSA told Mr. Bittle that he must decide within 7 days either to waive his military retired pay and thereby retain civilian retirement status or to return to work without backpay. Mr. Bittle responded on July 22 that he had not received a final decision from OPM and that he believed he was entitled to backpay whether he waived his military retired pay or returned to work. He requested backpay from May 3, 1985, until the date his retirement was approved or he returned to work. On July 31, GSA acknowledged that OPM had not disapproved Mr. Bittle's retirement application, withdrew its offer for him to return to work, and advised him that, pending OPM's final decision, "you are on OPM's roles [sic]."

OPM later learned from the Military Finance Center that, according to its records, Mr. Bittle's disability was not caused by an instrumentality of war. Mr. Bittle received official notification from OPM denying his application for retirement by letter dated October 28, 1985. After explaining that Mr. Bittle did not meet the qualifications for optional retirement, the letter stated that unless there was some circumstance of which OPM was not aware, Mr. Bittle was entitled to backpay until the day he was restored to GSA's rolls.

GSA responded that it processed Mr. Bittle's application based on inaccurate information it received from him on his retirement papers and, consequently, it would not award him backpay. Mr. Bittle returned to work on March 10, 1986, and submitted a backpay claim for the period May 3, 1985, until March 9, 1986.

ANALYSIS

An employee's entitlement to backpay is authorized under 5 U.S.C. § 5596. The implementing regulations are located at 5 C.F.R. § 550.801. Under these provisions, agencies are required to award backpay to employees upon a finding, based on a determination by appropriate authority, that an employee has undergone an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of all or any part of the employee's pay.

As support for its determination not to award Mr. Bittle backpay, GSA cites a recent Comptroller General decision, Benjamin C. Hail, B-216573, February 11, 1985. Our Office held in Hail that a civilian employee of the Defense Logistics Agency was not entitled to backpay since he was informed correctly of the requirement to waive his military retired pay in order to combine his military and civilian

service and retire immediately. In the Hail case, the agency processed the employee's retirement application under the belief that the employee intended to waive his military retired pay. After retiring, the employee refused to waive his military retired pay and had to be reinstated to his former position.

Mr. Bittle contends that his case is distinguishable from the Hail case since his agency knew that he did not intend to waive his military retired pay. It is true that Mr. Bittle, unlike Mr. Hail, made clear his intention not to waive military retired pay. Nevertheless, the fundamental context of both cases is the same. In both the Hail case and Mr. Bittle's case, the employees' agencies processed voluntary retirement applications on the premise that the retiring employees would qualify for civil service annuities in accordance with the requirements about which the employees had been accurately informed. In Mr. Bittle's case, instead of the waiver requirement, his retirement application was processed on the basis that his retired pay was for Reserve service. In both of these cases, the employees would have been eligible to retire under their combined military and civilian service had they actually met the requirements for retirement that they had led their agencies to believe were, or would be, met.

We have held that, in view of the responsibility of an agency to maintain retirement records and to counsel employees on their retirement rights, if an employee's retirement is induced by administrative error and the employee is later restored to the agency's rolls, even if the retirement was voluntary, the employee is entitled to backpay under 5 U.S.C. § 5596 for the period he was off the rolls. See B-175498, June 20, 1972, and decisions cited. By the same token, however, we have denied backpay where a retirement application eventually rejected by OPM was not induced by misleading information or other defective counseling provided by the agency. See Benjamin C. Hail, discussed above; Linnie V. Blevins, B-204876, June 14, 1982; Charles M. Kindrick, B-187891, June 3, 1977.

The present case falls into the latter category. After what appears to have been appropriate counseling, the agency accepted Mr. Bittle's retirement application under the impression that he was eligible to retire and still retain his military retired pay as the information on his retirement application suggested. The fact that the agency knew he did not intend to waive his military retired pay is inconsequential in this case.

In conclusion, we do not find that Mr. Bittle's retirement was induced by an unjustified or unwarranted personnel action entitling him to backpay. Accordingly, Mr. Bittle's claim must be denied.

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