

DECISION

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

JAN 8 1979

FILE: B-128314

DATE:

MATTER OF: Lee E. Hoffler - Disability Retirement Denial -
Backpay Pending Determination

DIGEST: Employee of Navy was on leave and approved leave without pay pending Civil Service Commission determination of his application for disability retirement including his unsuccessful appeal of CSC denial of his application. There is no basis to provide employee with backpay pursuant to 5 U.S.C. 5596 since record does not establish that leave was involuntary nor that employee was ready, willing, and able to work during such period.

By letter dated August 22, 1978, Mr. Lee E. Hoffler, an employee of the Department of the Navy has appealed the disallowance by our Claims Division of his claim for backpay and recredit of leave for the period May 28, 1974, to May 29, 1975, while he was on leave status pending a determination by the Civil Service Commission (CSC) on his application for disability retirement.

The record shows that Mr. Hoffler, at the time a Pipefitter, WG-8, with the Norfolk Naval Shipyard (Shipyard), Portsmouth, Virginia, suffered the loss of the thumb and forefinger of his left hand in a non-occupational hunting accident on November 29, 1969.

On November 10, 1970, a Shipyard medical officer determined that Mr. Hoffler should be placed in a restricted work assignment as he determined that his injury rendered him permanently incapable of climbing where both the use of his legs and arms are required. A restricted work assignment was available in the shop where he was employed and he continued in the capacity of a pipefitter at the WG-8 level. On August 22, 1971, he was promoted to the position of Pipefitter, WG-10, in a position which did not have limited duties based upon the physical handicap of the occupant. On March 12, 1974, the Production Superintendent, Service Group Shop, became aware of the permanent physical restriction which had been placed upon Mr. Hoffler as a result of the November 10, 1970 medical evaluation. A fitness for duty examination was then given him and on May 13, 1974, the examining Shipyard medical officer determined that he was not qualified for full duty in his position on the basis that he was incapable of climbing ladders or staircases as he might lose his grip. On May 28, 1974, the acting head of the Temporary Service Shop determined that an appropriate restricted work

assignment was not available at that time in a pipefitter's position. Mr. Hoffler was then advised of the unavailability of a restricted work assignment and that he would be placed on sick leave. The agency report states that Mr. Hoffler during counseling on this matter then expressed a desire to apply for disability retirement. He filed an application for disability retirement the same day, May 28, and indicated that he did not desire placement action to another position. From May 29, 1974, through December 20, 1974, he was in a sick leave status, from December 21, 1974, through February 24, 1975, he was on annual leave, and from February 25, 1975, through August 17, 1975, he was in an approved leave-without-pay (LWOP) status.

On December 26, 1974, the Bureau of Retirement, Insurance, and Occupational Health (Bureau), CSC, denied Mr. Hoffler's application for disability retirement on the basis that the medical disorder involved was not disqualifying for full performance of the duties of the employee's position under qualification standards.

Mr. Hoffler appealed the decision of the Bureau to the Federal Employee Appeals Authority (FEAA), Atlanta field office, CSC. By letter dated January 8, 1975, the FEAA affirmed the Bureau's disallowance. It acknowledged that the objective medical evidence showed that Mr. Hoffler's left hand was inadequate for pulling or climbing - "two activities in which pipefitters frequently engage." However, they held that Mr. Hoffler's disability was a pre-existing condition which was not totally disabling as he had performed in his position for a period of approximately 2½ years before he filed for disability retirement and the record did not show that his condition had changed.

On May 30, 1975, the Norfolk Shipyard received notification of that FEAA action and on August 6, 1975, they provided a fitness for duty examination in which the Shipyard medical examiner held that he was incapable of climbing ladders or staircases. He was returned to duty on August 18, 1975, in a Pipefitter, WG-10 position which accommodated his physical restrictions.

On October 10, 1976, Mr. Hoffler submitted a claim to our Claims Division for recredit of the annual and sick leave he used during the period May 29, 1974, through February 24, 1975, and for retroactive accrual of leave and backpay for the period he was on LWOP status, February 25, 1975, through August 17, 1975.

The record shows that the agency--apparently as a result of our request for an administrative report on the matter--has paid Mr. Hoffler backpay in the amount of \$2,586.26 and credited his leave accounts for annual and sick leave in the respective amounts of 48 hours and 24 hours for the period May 30, 1975, to August 17, 1975, during which Mr. Hoffler had been on a LWOP status. This period represents the time between the agency's receipt of notification of the FEAA's denial of his appeal of the disallowance of his application for disability retirement and the date on which he was restored to a duty status. While the facts relating to this action are not entirely clear, we will not question the agency's action in allowing backpay for this period at this time. It is clear that excessive delay in returning Mr. Hoffler to a pay status was involved.

Our Claims Division disallowed Mr. Hoffler's claim for backpay and restoration of leave from May 28, 1974, to May 29, 1975, on the basis that the placing of an employee in a sick or annual leave status or in a LWOP status is primarily a matter within the discretion of the agency. In addition, the Claims Division determined that the record showed that he had accepted the agency's determination to place him on a leave and LWOP status.

The Back Pay Act, 5 U.S.C. 5596 (1976) provides in pertinent part that an agency employee who is found to have undergone an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or part of his pay and allowances is entitled upon correction of the action to recover the amount the employee would have earned during that period as if the personnel action had not occurred and for all purposes the employee is deemed to have performed services for the agency during that period.

There is no contemporaneous evidence in the record to show that Mr. Hoffler objected in any way, to the agency's evaluation of his physical condition or to the determination to place him on a leave status. The record shows that upon being advised by the agency of its findings of his physical condition Mr. Hoffler immediately submitted an application for disability retirement stating that he did not desire placement action to another position. Furthermore, he appealed the initial determination by the CSC that he was not totally disabled. There is nothing in the record to show that Mr. Hoffler

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attempted to take any action to return to work during the period in question. Thus, on the basis of the record before us we cannot conclude that his placement on leave and LWOP was involuntary or that he was in fact ready, willing, and able to perform his duties during the period from May 28, 1974, through May 30, 1975. B-179965, July 18, 1974. See also _____, B-184522, March 16, 1976, and April 21, 1977. Therefore, there is no basis for allowing Mr. Hoffler backpay under 5 U.S.C. 5596 (1976), for the above period.

Accordingly, the disallowance of Mr. Hoffler's claim by our Claims Division is affirmed.

R.F.KELLER

Deputy

Comptroller General
of the United States