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DECISION

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

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FILE: B-181313 DATE: FEB 7 1975

MATTER OF: William J. Heisler - Leave Without Pay

DIGEST:

Employee placed on involuntary leave because of medical opinion that employee might have tuberculosis is not entitled to reimbursement for loss of pay for period he was in leave without pay status merely because it is later determined that employee did not have tuberculosis, since agency's action was not unjustified or unwarranted in that it was based on possibility that employee had tuberculosis, relying on employee's own physician's incorrect diagnosis of that disease. Kleinfelter v. United States, 318 F. 2d 929 (Ct. Cl. 1963) and Seebach v. United States, 182 Ct. Cl. 342 (1968), distinguished.

An accounting and finance officer of the Defense Supply Agency has requested an advance decision on the claim of William J. Heisler, a wage board employee of the Defense General Supply Center, Richmond, Virginia.

Mr. Heisler's claim is for payment for 475 hours of leave without pay (LWOP) charged to him from October 22, 1971, to January 18, 1972. During that period, Mr. Heisler was not permitted to work because of an illness which had been diagnosed as tuberculosis, and was in LWOP status because he had exhausted his annual and sick leave balances. It was later determined that Mr. Heisler did not have tuberculosis and could return to work. He did so on January 19, 1972.

Mr. Heisler's claim is based on his statement that he "was willing and ready to work" but was "prevented from working by Government officials who incorrectly diagnosed that I had tuberculosis." He, therefore, claims not only payment for the period he was in LWOP status, but also restoration of the annual and sick leave he was charged during the period involved as well as credit for leave not credited because of his LWOP status.

The record shows that Mr. Heisler visited a private physician on October 5, 1971, and from October 7 through October 11, 1971, was an in-hospital patient under the care of that private physician. As a result of a biopsy and other tests, Mr. Heisler's physician diagnosed his illness as tuberculosis on October 21, 1971. Mr. Heisler then entered a Veterans Administration (VA) hospital on October 25, 1971, from which he was discharged on November 3, 1971. On the next day,

Mr. Heisler was seen at the Defense General Supply Center's health clinic. The physician at the clinic consulted with doctors at the VA hospital, and was told that there was no positive evidence that Mr. Heisler had tuberculosis, but that he should not work for 6 to 8 weeks, the incubation period for tuberculin cultures. Mr. Heisler was next seen at the clinic on January 18, 1972. The clinic physician consulted with the claimant's private physician, who advised that although he hadn't seen Mr. Heisler since October, Mr. Heisler had been released by the VA hospital to his care with an indication that no tuberculosis had been found, and that as far as he was concerned Mr. Heisler could return to work, since somebody "goofed" in originally diagnosing tuberculosis. The clinic physician then checked with the VA hospital doctor, who said the cultures were negative and that he recommended that Mr. Heisler return to work "a long time ago."

The general rule applied by our Office is that an employee may be placed on leave without his consent when administrative officers determine, upon the basis of competent medical findings, that the employee is incapacitated for the performance of his assigned duties, and that the involuntary leave does not, under such circumstances, constitute an unjustified or unwarranted removal or suspension without pay within the meaning of the back pay provisions of the applicable statutes. 41 Comp. Gen. 774 (1962).

The current statute, the Back Pay Act of 1966, Public Law 89-380, 80 Stat. 94, 5 U.S.C. § 5596 (1970), provides that an agency employee who is found to have undergone an "unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of" his pay is entitled, upon correction of the personnel action, to recover the amount the employee would have been paid had the personnel action not occurred, less any amount otherwise earned by the employee during the period involved. The Court of Claims, in construing the words "unjustified or unwarranted," has held that Government employees who are placed in an involuntary leave status for medical reasons are entitled to recover lost compensation for the period involved when it is shown that the employees were ready, willing and able to perform their duties and were not, in fact, medically incapacitated at the time they were placed on leave and prohibited from working. Kleinfelter v. United States, 318 F. 2d 929 (Ct. Cl. 1963); Seebach v. United States, 182 Ct. Cl. 342 (1968). In Kleinfelter, an employee was placed on involuntary sick leave or annual leave, and later on leave without pay, after an agency physician advised the Civilian Personnel Office that an annual physicial examination showed the employee was physically disqualified for performance of his normal duties because of his cardiac condition and age. In Seebach, an employee was diagnosed by a Public Health Service doctor as being paranoid and was placed on involuntary leave. In both cases, the Government applied for the employee's involuntary disability retirement.

In both instances, the Civil Service Commission (CSC) held that the employee was not totally disabled under the Civil Service Retirement Act, 41 Stat. 614, as amended, 5 U.S.C. § 2257 (Supp. IV, 1953-57, and 1958), and in both instances the Court viewed the CSC decision as a determination that the employee was not medically incapacitated at the time the employee was placed on leave.

We think those cases are distinguishable from the instant one primarily on the ground that they involved a retroactive determination regarding the fitness for duty of the claimant at the time he was placed in involuntary leave status. Here, although claimant ultimately was found not to have tuberculosis, there has been no authoritative determination that claimant was not disabled at the time he was placed on involuntary leave. On the contrary, the record shows that claimant suffered from a medical problem, that he was twice hospitalized for it, that his personal physician first diagnosed the problem as tuberculosis, and that the recommendation of the VA physician that claimant not be permitted to work was based not on diagnosis of tuberculosis, but rather on the possibility that claimant might be suffering from that disease. Thus, the agency's action here was not based on a mistaken medical finding (we note that it was only the claimant's private physician, and not any Government doctor, who had concluded that claimant had tuberculosis) as in Kleinfelter and Seebach, but was based on a competent medical opinion that claimant might have tuberculosis, an opinion that was reasonable under the circumstances and upon which the agency could properly rely in refusing to permit claimant to work.

In short, the record indicates that the agency properly regarded the claimant as unable to perform his duties because of the possibility that he had tuberculosis, but then permitted the claimant to return to work as soon as it learned that claimant did not, in fact, suffer from that disease. In this regard, we think the situation is analogous to the situation where an employee is suspended from work or separated because of a medical disability and then is permitted to return to work when the disability disappears. In such situations, the employee is not entitled to recover for the period of the suspension. See La Ruffa v. United States, 129 Ct. Cl. 25 (1954).

The only possible basis for Mr. Heisler's claim is the fact that he should have been able to return to work some time before January 19, 1972. Although the VA physician told the health clinic physician that he had recommended a return to work a "long time ago," the record is silent as to when and to whom this recommendation was made and as to whether it was transmitted to claimant's agency. The record also does

not indicate that the claimant made any attempt to return to work between November 4, 1971, and January 18, 1972, or that he sought a follow-up medical determination regarding his condition during that period. Accordingly, on the basis of the present record, no portion of the claim may be paid.

B.F.KELLER

Acting Comptroller General
of the United States