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**DECISION**



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

**FILE:** B-188125

**DATE:** October 31, 1977

**MATTER OF:** David E. Bright, Jr. - Air Traffic Controller -  
Backpay for Medical Disqualification

**DIGEST:** Air traffic controller was involuntarily removed from air traffic control duties for medical disqualification. Federal Aviation Administration's Board of Review concluded that medical evidence did not support finding of medical disqualification and reversed the agency's determination. Board's decision is final on the matter and is tantamount to finding of an unwarranted and unjustified personnel action. Employee is entitled to premium pay which he would have earned during period of reassignment away from traffic control duties under Back Pay Act, 5 U.S.C. 5596.

This action concerns the claim of Mr. David E. Bright, Jr., an employee of the Federal Aviation Administration (FAA), for certain premium pay and differentials which he claims were lost as the result of his temporary reassignment for medical reasons from air traffic control duties to administrative duties. The matter has been referred to our Office jointly by the FAA and the Professional Air Traffic Controllers Organization (PATCO) in lieu of arbitration.

At all relevant times, Mr. Bright was an Air Traffic Control Specialist at the Oakland, California, Air Traffic Control Tower. On June 16, 1975, Mr. Bright was taken off air traffic control duties and placed on administrative duties pending medical evaluation. Upon receipt and review of medical reports, the Regional Flight Surgeon recommended to the Chief, Oakland Control Tower, on July 21, 1975, that Mr. Bright be removed from air traffic control duties. This recommendation was stated to be based on the medical findings of the consulting doctors. On July 29, 1975, Mr. Bright was advised that he was medically disqualified for flight control and was removed from such duty.

By letter dated August 4, 1975, Mr. Bright advised the Chief, Oakland Control Tower, that he wished to appeal the determination of the Regional Flight Surgeon that he was not medically capable of continuing his flight control duties. On appeal, Mr. Bright submitted new medical evaluations which were completed in August 1975 by a different set of specialists. Upon receipt of the reports of the new doctors, the FAA Regional Flight Surgeon issued a final decision on October 7, 1975, confirming his previous finding of

B-188125

medical disqualification. Three days later, Mr. Bright received a notice of determination from the Chief, Oakland Control Tower, that he was to be permanently removed from active control duties by reason of medical disqualification. On October 15, 1975, Mr. Bright requested that the Administrator, Federal Aviation Administration, reconsider the Regional Flight Surgeon's determination. By letter dated November 13, 1975, the Acting FAA Administrator sustained the medical disqualification, and stated that a Board of Review would be convened in accordance with 5 U.S.C. 3383 (Supp. IV, 1974).

The Air Traffic Control Specialist Second Career Program Board of Review met on January 26, 1976, and reversed the Acting Administrator's finding of medical disqualification. The Board reviewed the reports of each of the doctors and noted that none of them recommends that Mr. Bright be removed from his air traffic control position. From its review of the medical statements and the other information of record, the Board of Review found:

"\* \* \* the evidence presented does not support a conclusion that Mr. Bright is not medically qualified for air traffic control duties."

Accordingly, the Board reversed the decision of the Acting Administrator issued November 13, 1975. Mr. Bright was restored to air traffic control duties on March 21, 1976.

On April 2, 1976, Mr. Bright filed a grievance requesting backpay for all night and Sunday differential, holiday pay, and overtime premium pay which he would have received if he had been scheduled to perform air traffic control functions from June 16, 1975, to March 21, 1976. The grievance was administratively denied on the grounds that the reassignment from control duties was not a disciplinary action. Although PATCO initially indicated that it would submit the grievance for arbitration, the matter was subsequently referred jointly by the FAA and PATCO to our Office for a decision in lieu of arbitration.

Mr. Bright requests backpay for each element of premium pay previously requested by his grievance. It is his contention that his involuntary suspension from air traffic control duties constituted an unwarranted or unjustified personnel action for which

E-188125

backpay may be awarded pursuant to 5 U.S.C. 5596 (1970). In response, the FAA argues that an unwarranted or unjustified personnel action is one which violates the requirements of a nondiscretionary provision which requires the agency to take a prescribed action under stated conditions or criteria. The FAA contends that 5 U.S.C. 3381 et seq. (Supp. IV, 1974) and the implementing directive, FAA Order 3410.11A (May 16, 1975), prescribe discretionary, rather than nondiscretionary, provisions for removal of an air traffic controller from air flight duties. It is thus argued that reassigning Mr. Bright from air traffic control duties did not violate the requirements of a nondiscretionary provision, and therefore was not unwarranted or unjustified.

Recognizing the unique occupational status of air traffic controllers, Congress enacted Public Law 92-297 on May 16, 1972, in order to establish a second career program and to provide other benefits for controllers who must be removed from flight control functions. Thus, 5 U.S.C. 3381 vests the agency with discretion to remove an employee as a controller when required to do so for medical reasons. However, 5 U.S.C. 3383 specifically provides for a board of review which has the power to determine the validity of the removal action and to issue a decision which is binding on both the agency and the employee. Thus, it is clear that the agency has the discretionary right to reassign employees, but the FAA's discretion to reassign air traffic controllers to other duties is subject to the review procedures set forth in the statute (5 U.S.C. 3383). Where the Board decides that the agency exercised its discretion erroneously, the Government should bear the loss of premium pay involved, not the employee. See Mary E. Seabach, 182 Ct. Cl. 542, 350 (1968). The original action to remove Mr. Bright thereupon became subject to the provision of the regulations governing awards of backpay at 5 C.F.R. 550.803(d) (1976) as follows:

"(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action."

B-188125

In addition, the FAA contends that the removal actions were justified based on an apparent medical disqualification of Mr. Bright, and that failure to remove him may have jeopardized air safety. This Office has long held that Government employees who are reassigned or placed in an involuntary leave status for medical reasons are entitled to recover lost compensation, including premium pay, 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 of the reassignment or suspension. Thus, where the medical findings on which the personnel action was based have been overturned or where there were no medical findings to support the administrative determination, our Office has held the suspension to be an unjustified or unwarranted personnel action. 39 Comp. Gen. 154 (1959) and B-170092, September 1, 1970. Of course, where there are competent medical findings that the employee was in fact incapacitated at the time of the suspension, a personnel action based thereon would not be unjustified or unwarranted. 41 Comp. Gen. 774 (1962). See Connie R. Cecchias, B-184522, March 16, 1976; sustained upon reconsideration, April 21, 1977.

In the present case, the FAA's own Board of Review overturned the disqualification of Mr. Bright, stating specifically that the evidence did not support a conclusion of medical disqualification. In so doing, the Board noted that neither of the experts selected by the FAA recommended that Mr. Bright be removed from air control duties. Since the initial removal action was predicated on the opinions of those experts, there is an authoritative determination in this case by the Board of Review that removal was not supported by the evidence, and that Mr. Bright was not medically disabled for air traffic control duties. In our view, the Board's decision is tantamount to a finding of an unwarranted or unjustified personnel action which is compensable under the provisions of 5 U.S.C. 5596 and 5 C.F.R. 550.804. Premium pay is specifically included in 5 C.F.R. 550.804(b)(1) within the elements of compensation for which backpay may be awarded. Subchapter V of chapter 55, title 5, United States Code, includes overtime pay, Sunday and holiday pay, and night differential within the general category of premium pay. Since we have held that an employee's award of backpay should be computed at the rate he was receiving on the date he was suspended, including premium pay he normally would have earned during the period of suspension, an award of premium pay to Mr. Bright in this case is appropriate. See 39 Comp. Gen. 154, 157, supra.

B-188125

Our decision is not intended to second-guess the reasonableness of the initial decision to reassign the claimant, nor to imply that that decision was arbitrary or capricious. The FAA clearly has the right to remove its employees from air traffic control duties in the interest of aviation safety, and it need not and should not avoid its duty to protect aviation safety even in close cases. Where, however, under the statutory review procedures, the Board of Review determines that a removal action was not supported by the medical evidence, the agency must restore the employee to his position and reimburse him for the mistaken action taken to his detriment. See Mary E. Seebach, supra, at 350.

Accordingly, if otherwise proper, Mr. Bright may be paid each of the above elements of premium pay which he would have earned for the period from June 16, 1975, to March 21, 1976, but for the unwarranted and unjustified removal from air traffic control duties.

*W. K. K. K.*  
Acting Comptroller General  
of the United States