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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20540**

FILE: b-191611

DATE: April 19, 1978

MATTER OF: Lawrence Kamenetzky and Beverly Agee - Backpay

**DIGEST:** Pursuant to court order, agency removed two employees from positions to which they had been promoted. Subsequent court order permitted agency to take whatever personnel action it deems appropriate, including reinstatement of the two employees. If agency determines that removal constituted unwarranted or unjustified personnel action, backpay may be paid.

In a letter dated April 4, 1978, Mr. Abner W. Sibal, General Counsel of the Equal Employment Opportunity Commission (EEOC), requested our decision on the legality of a proposed personnel action to restore two EEOC employees to GS-14 trial attorney positions with backpay.

In 1975, Ronald G. Cohn, an attorney in the EEOC's Atlanta Regional Office of General Counsel, sued the agency alleging discrimination. Cohn v. EEOC, No. C75-1085A (N.D. Ga.). The EEOC entered into a consent decree with the plaintiff. Thereafter, two other attorneys, Lawrence Kamenetzky and Beverly Agee, were promoted to GS-14 positions in the EEOC Atlanta Regional Office. Mr. Cohn brought a contempt action, which the District Court sustained upon a finding that the agency, in making its promotion decision, had not accorded the plaintiff the "constructive experience" to which he was entitled under the consent decree. The District Judge ordered the promotions of Mr. Kamenetzky and Ms. Agee vacated and the selection procedure redone in compliance with the consent decree.

Mr. Kamenetzky and Ms. Agee then sought intervention, which the Court denied. They appealed the District Court's decision. While their appeal was pending, the agency removed Mr. Kamenetzky and Ms. Agee from their positions. Thereafter, the agency reported to the Court that it was unable to comply with the Court's order requiring it to redo the selection. On October 26, 1977, the District Court entered a further order placing Mr. Cohn into one of the two vacant positions. The Court's order was silent as to the second position.

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On March 17, 1978, the District Court entered an additional order which provides in pertinent part:

"The Court therefore determines, inasmuch as the plaintiff has received complete relief, that the issue of reevaluation of the candidates for the remaining GS-14 position is moot. The EEOC is therefore free to take whatever personnel action it deems appropriate in the cases of Mr. Kamenetzky and Ms. Agee, including reinstatement at the GS-14 level."

Two additional facts are relevant in this matter. First, Mr. Kamenetzky, a veteran, sought review of his demotion by the Federal Employee Appeals Authority (FEAA). On December 21, 1977, FEAA ordered EEOC to reinstate Mr. Kamenetzky with backpay to the position that he formerly held. The Commission has not yet complied with FEAA's order, since it first sought the District Court's permission to comply. The District Court granted that permission in its order of March 17, 1978. Second, on March 17, 1978, the United States Court of Appeals for the Fifth Circuit reversed the District Court's denial of intervention to Mr. Kamenetzky and Ms. Agee. Cohn v. EEOC, No. 77-2069 (5th Cir. 1978).

Mr. Sibal's letter states that the EEOC plans to comply with the FEAA's order with respect to Mr. Kamenetzky. The letter further states that the EEOC likewise wishes to restore Ms. Agee to her former position, with backpay. The question presented for our consideration is whether, in view of the above circumstances, the EEOC may properly make an award of backpay to Mr. Kamenetzky and Ms. Agee.

Statutory authority for awards of backpay is found at 5 U.S.C. 5596, which provides in pertinent part as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

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"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period. \* \* \*"

The Civil Service Commission has published implementing regulations that are contained in 5 C.F.R. 550.801 et seq., 42 Fed. Reg. 16127, March 25, 1977. Specifically, 5 C.F.R. 550.803(d) provides that the "appropriate authority" to make a finding that a personnel action is unjustified or unwarranted includes the Comptroller General and the head of the employing agency or an agency official to whom corrective action authority is delegated.

In the present case, the District Court order dated March 17, 1978, specifically provides that the EEOC is free to take whatever personnel action it deems appropriate for the two employees, including reinstatement. The order contains no limitation or prohibition on the payment of backpay. If a determination is made by an authorized official of the EEOC that the removal of Mr. Kamenetzky and Ms. Agee from their GS-14 attorney positions constituted an unjustified or unwarranted personnel action, an award of backpay to Mr. Kamenetzky and Ms. Agee would be proper under the Back Pay Act and regulations.

Deputy

*R. F. K. Stein*  
Comptroller General  
of the United States