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**DECISION**



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

*[Entitlement to Grade and Pay Retention]*

**FILE:** B-195924

**DATE:** March 14, 1980

**MATTER OF:** Richard J. Magner - Grade and Pay Retention

**DIGEST:** Employee who held GS-13 position with Department of Energy (DOE) exercised statutory rights he had with former agency to reemployment in the GS-12 position he held with that agency prior to appointment with DOE, rather than undergo a transfer of function within DOE. He is not entitled to grade and pay retention under 5 U.S.C. § 5361 et seq. since he was not placed in a lower grade position as a result of declining to transfer with his function. He chose to exercise his statutory rights of reemployment independent of any rights he may have had in connection with the transfer of function.

This decision is in response to a claim for saved grade and pay submitted by the Defense Contract Audit Agency (DCAA) on behalf of its employee, Richard J. Magner. Mr. Magner, who has been reemployed by DCAA as a result of his exercise of reemployment rights held while employed by the Department of Energy (DOE), claims that he is entitled to grade and pay retention under the retroactivity provisions of Title VIII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1218, October 13, 1978 (5 U.S.C. § 5361 et seq.). Essentially, Mr. Magner claims that, because he exercised his reemployment rights under circumstances in which he claims he would otherwise have been reduced in grade and relocated as a result of a transfer of function within DOE, he is entitled to benefits under Title VIII.

The record shows that on April 20, 1974, Mr. Magner left his grade GS-12, step 7 position with DCAA's Boston Region to accept a GS-13, step 4 position with the Federal Energy Administration (FEA) in Albany, New York. His appointment with FEA was under circumstances that entitled him to statutory reemployment rights under Section 5(a)(1)(B) of the Emergency Petroleum Allocation Act (EPAA) of 1973, Pub. L. No. 93-159, 87 Stat. 627. By applying the provisions of Section 212 of the Economic Stabilization Act (ESA) of 1970

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to functions under the EPAA, Section 5(a)(1)(B) of the EPAA gave employees appointed without a break in service to any position for carrying out its provisions the right "to reemployment in the position occupied at the time of appointment or in a position of comparable grade and salary."

Under the Department of Energy Organization Act, Pub. L. No. 95-91, 42 U.S.C. § 7101 et seq., all the functions of the FEA were transferred to the new Department of Energy, effective October 1, 1977. Section 702(c) of that Act, in effect, repealed reemployment rights under Section 212 of the ESA as incorporated by the EPAA effective 120 days from October 1, 1977, and expressly limited the privilege to exercise those and other reemployment rights as follows:

"(c) Employees transferred to the Department holding reemployment rights acquired under section 28 of the Federal Energy Administration Act of 1974 or any other provisions of law or regulation may exercise such rights only within one hundred twenty days from the effective date of this Act or within two years of acquiring such rights, whichever is later. Reemployment rights may only be exercised at the request of the employee."

In early January of 1978 regional enforcement personnel of the DOE, including Mr. Magner, were notified that their employment rights would, in most cases, expire on January 28, 1978, and that there would be some reassignments of field personnel. Apparently Mr. Magner had earlier learned that there was a distinct possibility that the Albany office to which he was assigned would be closed and that he would be transferred to New York City. Unwilling to relocate and aware that his reemployment rights with DCAA would expire shortly, Mr. Magner chose to exercise those rights on January 10, 1978. He reported for duty with DCAA's Boston Region on February 12, 1978, where he was reemployed at grade 12, step 8. Mr. Magner claims that, under the Civil Service Reform Act of 1978, he is entitled to retain the grade GS-13 that he held with DOE.

Title VIII of the Civil Service Reform Act amends title 5 of the United States Code to provide grade and pay retention

for certain Federal employees who have been subject to reductions in grade as a result of grade reclassification actions or reductions in force. A qualifying employee who is reduced in grade as the result of a reduction in force is entitled to retain his grade for 2 years and to retain his pay indefinitely thereafter, unless his entitlement ceases under prescribed conditions. These provisions apply retroactively to certain employees whose demotions occurred on or after January 1, 1977, and prior to the first pay period beginning on or after January 1, 1979, under circumstances which would have entitled the employee to grade retention under 5 U.S.C. § 5362.

The Office of Personnel Management (OPM) has issued interim regulations on grade and pay retention. See title 5, Code of Federal Regulations, Part 536, and Federal Personnel Manual Bulletin 536-1, March 30, 1979. Under its authority at 5 U.S.C. § 5365(b)(3) to provide for application of all or portions of the statutory grade and pay retention provisions of that subchapter to justifiable situations, OPM, at 5 C.F.R. § 536.202, has extended grade retention and pay retention to individuals who decline to transfer with their functions and who, prior to separation for declining to transfer are placed in a lower graded position provided:

"(1) The transfer of function is to a location outside the employee's commuting area; and

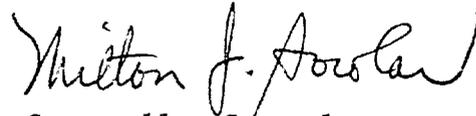
"(2) The employee has served for 52 consecutive weeks or more in one or more positions at a grade or grades higher than that of the lower-graded position in which placed."

Mr. Magner was not placed in a lower grade position as a result of declining to transfer with his function, but chose to exercise the statutory rights of reemployment he held independent of any rights he may have had in connection with a transfer of function. While the reemployment rights he held gave him additional flexibility in the face of a potential separation or reduction in grade for declining to transfer

B-195924

with his function, the statutory provisions that granted him those rights define the extent of his former agency's obligation to reemploy him. We are unable to find that the grade and pay retention authority of 5 U.S.C. § 5361 et seq., as amended by Title VIII of the Civil Service Reform Act of 1978, was intended to expand upon his former agency's statutory obligation of reemployment.

Accordingly, Mr. Magner is not entitled to retained grade and pay under 5 U.S.C. § 5361 et seq. in connection with his reemployment with the Defense Contract Audit Agency.

A handwritten signature in cursive script, reading "Milton J. Aroslaw".

For the Comptroller General  
of the United States