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DECISION



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

[Request for Reconsideration]

FILE: B-199667

DATE: March 2, 1981

MATTER OF: Reconsideration of Frank A. Fishburne -
Retirement Date

DIGEST: Employee requests reconsideration of our denial of his request to set effective date of his retirement retroactively to February 29, 1980. His agency's failure to request formal OPM determination on whether career reserved SES position could be filled with reemployed annuitant was not administrative error. Agency sought informal advice from highest levels at OPM and employee was not misinformed, although OPM later changed its policy to allow re-employed annuitants to fill career reserved positions. Thus, we find no administrative error and prior decision is affirmed.

Frank A. Fishburne requests reconsideration of our decision B-199667, October 7, 1980, in which we held that Mr. Fishburne's retirement date may not be retroactively changed to February 29, 1980.

The facts, as set forth in our October 7, 1980, decision, Matter of Frank A. Fishburne, are summarized as follows.

Mr. Fishburne was employed as Deputy Comptroller of the Air Force, a career reserved Senior Executive Service (SES) position. [He was interested in retiring prior to March 1, 1980, apparently in order to obtain the cost-of-living increase then payable to Federal retirees.] Because of the large turnover in high level Air Force positions, Mr. Fishburne's supervisor wanted him to continue in his position after March 1, 1980, as a reemployed annuitant. Officials of the Air Force contacted Ms. Sally Greenberg, Associate Director of Executive Personnel and Management Development, Office of Personnel Management, concerning bringing Mr. Fishburne back as a reemployed annuitant. [Ms. Greenberg advised the Air Force that career reserved SES positions could not be filled with reemployed annuitants. Upon receiving this information] in late January 1980 [Mr. Fishburne

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apparently decided not to retire and the matter was dropped.

By letter dated February 27, 1980, OPM advised the Air Force in writing that SES retirees could be retained as reemployed annuitants in SES career reserved positions. This was a clear turnabout in OPM's policy on this matter. While this letter may not have been received by the Air Force until after February 29, the Air Force was aware of the contents of the letter on February 27. [The Air Force notified Mr. Fishburne, who was on temporary duty in Denver, Colorado, of OPM's decision on the same day.] Thus, on February 27, 1980, Mr. Fishburne had all of the necessary information on which to base his decision concerning retirement. [This left Mr. Fishburne several days to submit his retirement application if he desired to retire before March 1. However, he did not submit his retirement application until March 11, 1980. His application for retirement requested an effective date of February 29, 1980.]

In our decision of October 7, 1980, [we found that Mr. Fishburne's separation was not effected under a mistake of law or fact. We also held that there was no administrative error which would constitute an unjustified or unwarranted personnel action] under the Back Pay Act, 5 U.S.C. 5596 (1976), [that prevented the personnel action from being effected as originally intended. Accordingly, we held that his retirement could not be made retroactive to February 29, 1980, as requested.]

Mr. Fishburne has requested reconsideration of that decision. Apparently, [he believes that the Air Force's failure to formally submit to OPM the issue of reemployed annuitants serving in career reserved SES positions constitutes an administrative error.] It appears that he is drawing a distinction between a formal request (the Air Force did not request in writing that OPM rule on Mr. Fishburne's specific case) and the informal inquiries that the Air Force did make on his behalf.

[In order to find that the Air Force's failure to formally submit the matter to OPM for resolution constitutes an administrative error,] as suggested

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by Mr. Fishburne, (there would have to exist some nondiscretionary regulation or policy that requires an agency to submit such matters to OPM.) For instance, in Dale Zeigler and Joseph Rebo, B-199774, November 12, 1980, we held that an agency's failure to timely submit to OPM questions concerning an employee's entitlement to a discontinued service retirement as required by regulation, constituted an administrative error. Thus, in that case we permitted the retroactive adjustment of the effective date of the employees' retirement.

(In this case, however, we are unable to find any regulation that would require the Air Force to seek formal guidance on this matter.) Nor has any such requirement been brought to our attention by Mr. Fishburne. Accordingly, (we do not find that the Air Force committed an administrative error in their handling of his retirement.)

In any event, even if the Air Force had sought formal advice on Mr. Fishburne's specific situation from OPM, it is unlikely that they would have received different information. The informal requests on behalf of Mr. Fishburne were made to the highest levels at OPM and reflected OPM's policy judgment on that issue. There is no evidence that the Air Force was misinformed. Rather, they were correctly informed of OPM's policy at that time. Even though OPM changed its policy in late February 1980, the Air Force was made immediately aware of this change and it kept Mr. Fishburne advised in a timely manner. In this respect (we believe that the period between Wednesday, February 27, 1980, (when Mr. Fishburne was advised of the change in OPM policy, and the close of business on Friday February 29, 1980, provided sufficient time for Mr. Fishburne to submit his application for retirement,) notwithstanding that he was on temporary duty in Denver, Colorado, during that time.

Accordingly, (for the reasons set forth above, we sustain our decision of October 7, 1980, holding

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that the effective date of Mr. Fishburne's retirement
may not be retroactively changed to February 29, 1980. }

Milton J. Fowler

Acting Comptroller General
of the United States