

**DECISION**

*PLM1*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

*24157*

FILE: B-206693

DATE: February 1, 1983

MATTER OF: Barry L. Levine - Severance Pay

**DIGEST:** National Institute for Occupational Safety and Health (NIOSH) announced that it was transferring its functions effective November 1, 1981. NIOSH employees were given the option to move with their function, but if they chose not to do so, they would be separated from service. On September 3, 1981, Mr. Levine, an employee of NIOSH, indicated that he would not accompany the transfer, but he never received a letter proposing to separate him. On September 10, 1981, NIOSH reversed its decision to transfer the function. Regulations state that employees are not eligible for severance pay if at the date of separation they decline an offer for an equivalent position in their commuting area, and the option to remain in the same position is equally preclusive. 5 C.F.R. § 550.701(b)(2) (1982). Since Mr. Levine could have withdrawn his resignation and remained in his position instead of separating from NIOSH, he is not entitled to severance pay.

Mr. Thomas S. McFee, Assistant Secretary for Personnel Administration, Department of Health and Human Services, requests a decision as to the entitlement to severance pay of Mr. Barry L. Levine. The issue presented is whether an employee who gives notice of his intent to resign after receiving a general notice that the organization by which he is employed will be transferred to a different geographic area, but whose resignation is not effective until after the transfer has been canceled, is entitled to severance pay. Our holding is that, under these circumstances, the employee is not entitled to severance pay.

Mr. Levine was employed by the National Institute for Occupational Safety and Health (NIOSH), in Rockville,

Maryland, and was notified on August 10, 1981, by a letter from the Director of the Personnel Management Office, Center For Disease Control, in Atlanta, Georgia, of a decision to transfer NIOSH functions from Rockville to Atlanta. The letter stated that the transfer of functions would be effective November 1, 1981, unless an earlier date could be arranged. The letter also requested that Mr. Levine inform NIOSH by September 14, 1981, whether he would relocate. If he elected not to transfer, and it was not possible to place him in another position, the letter stated that it would be necessary to propose his separation from the service. Furthermore, the letter concluded that should separation be necessary, it would be considered an involuntary separation in determining eligibility for retirement or severance pay.

Mr. Levine informed NIOSH, on September 3, 1981, that he would not relocate. However, on September 10, 1981, the House Appropriations Subcommittee prohibited the use of funds for the movement of employees to Atlanta until a more extensive review could be done. As a result of this action, the NIOSH functions were not transferred, and Mr. Levine never received a letter proposing to separate him from the service.

In the meantime, Mr. Levine secured employment in the private sector, and he resigned his position effective October 3, 1981. He was not given severance pay because NIOSH determined that his separation was voluntary, since he had not received a notice proposing to separate him for declining to accompany his activity when it was transferred, as required in 5 C.F.R. § 550.706(a)(3). We agree with NIOSH that Mr. Levine is not entitled to severance pay, although we reach our conclusion by a different analysis.

Payment of severance pay is authorized by 5 U.S.C. § 5595 (1976), which provides that an employee who has been employed currently for a continuous period of at least 12 months, and is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, is entitled to be paid severance pay. The issue then is whether Mr. Levine's resignation is to be considered an involuntary separation.

The severance pay regulations, specifically 5 C.F.R. § 550.706 (1982), set forth situations in which an employee's separation by resignation is deemed to be an involuntary separation. A resignation by an employee after receipt of a notice from his agency proposing to separate him for declining to accompany his activity when it moves to another commuting area would be an involuntary separation under this regulation. However, 5 C.F.R. § 550.701(b)(2), provides that:

"This subpart [severance pay] does not apply to an employee who at the time of separation from the service, is offered and declines to accept an equivalent position in his agency in the same commuting area, including an agency to which the employee with his function is transferred in a transfer of functions between agencies. For purposes of this paragraph, an equivalent position is a position of like seniority, tenure, and pay other than a retained rate."

It should be noted that the regulations do not specifically address the situation here in which a transfer of function was canceled, and employees were allowed to remain in the same positions they were holding when the transfer of functions was first proposed. It should also be noted that the regulation specifically refers to, "the time of separation" as the time for the offer of an equivalent position.

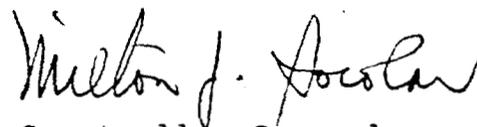
In this case, Mr. Levine could have retained his position instead of separating from the agency after the transfer of function was canceled. It is clear under the regulations that if NIOSH had offered him an equivalent position in the same commuting area, and the transfer of function had taken place, he would not have been entitled to severance pay.

It is equally clear that since Mr. Levine, following the cancellation of the transfer of function, was allowed to remain in the same position, in the same office, at the same grade and pay, he was also ineligible to receive severance pay under the statute. That is, the option to remain in the same position rendered his subsequent separation a voluntary one and precludes payment of severance pay.

The argument that the entitlement to severance pay vests on the date a written notice of resignation is submitted, instead of the date of separation, is not persuasive. Under the provisions of the Federal Personnel Manual, Chapter 715, Subchapter 2, a resignation is a voluntary action by an employee, and an agency may permit an employee to withdraw the resignation at any time before it has become effective, except when the agency has a valid reason to deny withdrawal. FPM Chapter 715, S2-3. Here, Mr. Levine could have withdrawn his resignation following the cancellation of the transfer of function, but chose not to do so. Accordingly, his claim for severance pay must be denied.

Mr. Levine alleges that certain other employees of NIOSH who resigned after the cancellation of the transfer of the function received severance pay. The record shows that three employees, Mr. Dorsey Boyd, Ms. Marjorie M. Cramer, and Mr. John R. Froines, did receive specific advance notices to separate them from the service effective October 31, 1981, because they declined to accompany the transfer of the function. These advance notices were dated August 27 and 28, 1981, and the employees were apparently separated based upon these notices, not by resignation.

NIOSH in a letter to Mr. Levine explains that these employees, and perhaps several others, had all received letters no later than September 1, 1981, proposing to separate them. Therefore, NIOSH concluded that the issuance of the final notice to separate these employees simply represented the completion of an action proposed at an earlier date. We express no opinion on whether it was proper to proceed with the separation of these employees after the transfer of function was canceled. Since these employees did not resign, their situation is distinguishable from Mr. Levine's.

for   
Comptroller General  
of the United States