

DECISION



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

FILE: B-214828

DATE: October 11, 1984

MATTER OF: George F. Ackley

DIGEST:

1. An air traffic controller who was selected for promotion to a higher grade position at another air traffic control facility claims backpay on the basis of the salary of the higher grade position where the agency improperly removed him prior to his promotion. Pursuant to a decision by the Merit Systems Protection Board the employee was reinstated by the agency at the lower grade at his original duty station, and the employee now does not wish to transfer to the higher grade at the other station. The employee's backpay for the period of improper separation should be computed on the basis of the salary of the higher grade position where the record clearly establishes that the employee would have been promoted if he had not been improperly removed.

2. An air traffic controller in Ohio who was selected for a higher grade position in Chicago, Illinois, was removed from his position prior to the consummation of the transfer. Upon reinstatement to his former position in Ohio as a result of a Merit Systems Protection Board decision reversing his removal, the employee requests reimbursement of real estate expenses he incurred. The employee may not receive reimbursement for real estate expenses where he entered into the sales agreement to sell his home after he had received notice of his imminent removal.

The Federal Aviation Administration has presented the question as to the proper computation of an employee's backpay under the Back Pay Act, 5 U.S.C. § 5596, upon his reinstatement to his former position where he had been selected for transfer to a higher grade position at another

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duty station prior to his improper removal. The agency also asks whether the employee may be reimbursed for expenses incurred in the sale of his residence at his old duty station where the transfer was not consummated due to the employee's removal from Government service.^{1/} The employee's backpay should be computed on the pay of the higher grade position where the record clearly establishes that the employee would have been promoted but for the unjustified or unwarranted personnel action which resulted in his removal. The employee may not be reimbursed for expenses he incurred in the sale of his residence since he entered into the contract for the sale of his residence subsequent to his receiving notice of his removal from his position.

Background

In 1981 Mr. George F. Ackley was employed as an Air Traffic Control Specialist, grade GS-12, at the Akron-Canton Tower, Ohio. In March 1981, he was selected for promotion to a grade GS-13 Air Traffic Control Specialist position at O'Hare airport in Chicago, Illinois. We have been advised by the agency that Mr. Ackley's selection for promotion was under the agency's Merit Promotion Program. His travel orders dated March 6, 1981, show that he was originally scheduled to report for duty at Chicago on May 5, 1981, but his transfer and promotion were delayed due to difficulty in selling his residence.

On August 3, 1981, the illegal strike against the Government was begun by members of the Professional Air Traffic Controllers Organization. Apparently, by letter dated August 7, 1981, the agency advised Mr. Ackley of its proposal to remove him from his position as an air traffic controller for his participation in the air traffic controller's strike. By letter dated August 26, 1981, the agency informed him that a decision had been made to remove him from his Government position effective September 1, 1981, on which date he was removed.

Mr. Ackley appealed his removal to the Philadelphia Regional Office, Merit Systems Protection Board, and on February 1, 1983, the Board reversed the removal on the

^{1/} The request for an advance decision was presented by the Director, Great Lakes Region, of the Federal Aviation Administration, Department of Transportation.

basis that the agency had not produced sufficient evidence to establish that he had been on strike. However, the Board stated that, based on the evidence of record, it was clear that the agency had established that he was absent without leave on August 7, 1981, and sustained that charge by the agency. Based on this determination, the Board reduced the adverse action from removal to a 60-day suspension. The matter of Mr. Ackley's selection for promotion and transfer to a higher grade position in Chicago was not before the Merit Systems Protection Board. Thus, the Board's determination concerned only the matter of the employee's September 1, 1981 removal from his grade GS-12 position at the Akron-Canton Tower.

The agency advises that pursuant to the decision by the Merit Systems Protection Board that reversed Mr. Ackley's removal, he was restored to duty at the Akron-Canton Tower on May 15, 1983, in a GS-12 position which is the highest graded non-supervisory position at that facility. The agency advises that had he not been removed on September 1, 1981, he would have received a promotion from grade GS-12 to grade GS-13 upon reporting to Chicago sometime after August 28, 1981, when he contracted to sell his residence. Mr. Ackley indicates that at this time he does not wish to transfer to Chicago. But, he has requested that his backpay be computed on the basis of the promotion to grade GS-13 that he would have received had he not been separated, and that he be reimbursed for the expenses he incurred in connection with the sale of his residence that he contracted for in anticipation of his transfer to Chicago. He states that he would have received these benefits had he not been wrongfully separated.

Back Pay Act - Lost Promotion

Under the Back Pay Act, 5 U.S.C. § 5596, an employee who has been affected by an unjustified or unwarranted personnel action resulting in a loss of pay, allowances, or differentials, is entitled upon correction of the personnel action to receive for the period of the action--

"an amount equal to all or any part of the pay, allowances, or differentials, as applicable, which the employee normally would have earned or received during the period if the personnel action had not occurred * * *."

5 U.S.C. § 5596(b)(1)(A)(i).

Concerning the computation of backpay, the regulations issued by the Office of Personnel Management to implement the Back Pay Act provide in part:

"(2) The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred." 5 C.F.R. § 550.805(a)(2).

Also, see Federal Personnel Manual Chapter 550, Subch. 8-5(b).

The backpay for the period of the employee's separation may include the benefit of a promotion which was not implemented as a result of the improper removal.^{2/} The amount of backpay properly due may be computed on the basis of a promotion during the period of the employee's separation where the facts clearly establish that the employee would have been promoted during the period of his removal but for the unjustified or unwarranted personnel action.^{3/}

As indicated, the agency states that Mr. Ackley would have been promoted to a higher grade position in Chicago sometime after August 28, 1981, if he had not been removed from his position. We have been advised by the agency that the 60-day suspension in accordance with the Merit Systems Protection Board's determination would not have resulted in the cancellation of Mr. Ackley's transfer and promotion to a higher grade position in Chicago.

The agency's regulations on promotions under the Merit Promotion Program provide that employees who receive such

^{2/} See Crowley, et al. v. Muskie, 496 F. Supp. 360 (D.C. 1980), reversed in part (as to the matter of attorney fees), 704 F.2d 1269 (D.C. Cir. 1983), and Gunston v. United States, 602 F.2d 316 (Ct. Cl. 1979).

^{3/} Federal Personnel Manual Supplement 990-2, Book 550, Subch. S8-4b(2). Also, see Power v. United States, 597 F.2d 258, 262 (Ct. Cl. 1979) (dictum), cert. denied, 444 U.S. 1044 (1980).

merit promotions shall be released from their positions no later than the beginning of the second full pay period after the losing office is notified of the selection. These regulations further provide that in situations involving geographic moves, the release date may be extended by mutual agreement between the releasing and gaining activities. Also, if a full performance level controller meets the 1-year time-in-grade requirement, he or she shall be promoted coincident with entering on duty at the new facility. We have been advised by the agency that Mr. Ackley did meet this time-in-grade requirement. The agency does not dispute Mr. Ackley's statement that the delay in his transfer and promotion to the grade GS-13 position in Chicago was solely due to his difficulty in finding a buyer for his residence.

Since the record shows that Mr. Ackley found a willing buyer for his home in August 1981, it clearly appears that he would in fact have transferred to the higher grade position in Chicago had he not been removed. It is our view that Mr. Ackley's current desire to remain in Akron-Canton should not affect the determination that his transfer to the grade GS-13 position in Chicago would have been consummated had he not been removed. Mr. Ackley states that he now is not interested in accepting a higher grade position in Chicago because he does not wish to occupy a "vulnerable training position" in Chicago at this time. He further states, however, that he would have reported to duty at Chicago upon his reinstatement if he had been so ordered. In view of this explanation, we do not find that Mr. Ackley's desire to remain in his GS-12 position at Akron-Canton Tower after reinstatement indicates in any way that he would not have transferred to Chicago had he not been removed from his position. Accordingly, we find that based upon his selection under the agency's Merit Promotion Program to a grade GS-13 position in Chicago, it is clearly established that he would have been promoted to that higher grade position but for the unjustified or unwarranted personnel action which resulted in his removal.

The agency asks whether Mr. Ackley's backpay may be computed on the basis of a grade GS-13 position where there is not a non-supervisory grade GS-13 Air Traffic Control Specialist position at the Akron-Canton Tower to which he may be promoted. The nonexistence of a GS-13 position at the Akron-Canton Tower to which Mr. Ackley may be promoted would not affect the computation of his backpay where he had

been selected for a promotion to a higher grade position at another installation. Here, it is undisputed that there existed a duly classified and established grade GS-13 position in Chicago to which he would have been promoted. Furthermore, the fact that he currently occupies a grade GS-12 position would not affect the computation of backpay based on a finding that the employee would have been promoted but for an unjustified or unwarranted personnel action. An employee's backpay may be computed on the basis of a constructive promotion during the period of his improper separation notwithstanding that upon reinstatement he is placed in the lower grade position which he occupied at the time of his improper removal. See Gunston v. United States, supra, footnote 2.

We therefore find that Mr. Ackley's backpay should be computed on the basis of grade GS-13 pay. Since the record indicates that he would have been transferred prior to that date had he not been removed, backpay should commence as of the first pay period beginning after October 31, 1981, the date on which his 60-day suspension would have ended.

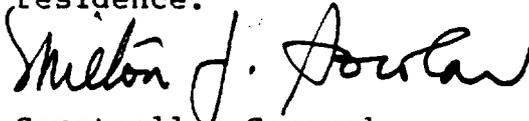
Reimbursement for the Sale of Residence

We have found that Mr. Ackley would have transferred to the position in Chicago if he had not been separated. In connection with his improper removal which prevented his transfer to Chicago, Mr. Ackley has requested reimbursement for the expenses he incurred in connection with the sale of his residence in Ohio. We have held that where an employee has been denied certain travel and transportation expenses which he would have received but for an improper personnel action, those allowances may be paid under the Back Pay Act. Ralph C. Harbin, 61 Comp. Gen. 57 at 60-62 (1981).

By letter dated August 7, 1981, the agency advised Mr. Ackley that it proposed to remove him from his position. By letter dated August 26, 1981, the agency advised him that he would be removed from his position effective September 1, 1981. On August 28, 1981, he signed an agreement to sell his residence with a proposed settlement date of September 25, 1981. The buyer's offer was submitted on August 28 and called for acceptance upon presentation. Thus, Mr. Ackley entered into the agreement to sell his residence after he had received notice that he would be removed from his position.

Mr. Ackley has stated that on the night of August 28, 1981, he called an agency official and asked him what he should do regarding the sale of his residence. He states that the official said that he did not know what advice to offer. Notwithstanding his call to an agency official for advice, under the circumstances Mr. Ackley reasonably could have refused the offer knowing that he was being removed from his position.

In cases involving cancelled transfers we have held that expenses incurred in connection with a change-of-station order may be reimbursed where the legal obligation to incur expenses was entered into in good faith prior to the employee's receiving notice of the cancellation of the transfer, but not for those expenses where the legal obligation was entered into after the employee received notice of the cancellation.^{4/} Since Mr. Ackley had notice of his impending removal prior to entering into the sales agreement, he may not be reimbursed for expenses he incurred incident to the sale of his residence.

for 
Comptroller General
of the United States

^{4/} See B-170259, September 15, 1970, and William E. Jackson, Jr., B-181321, November 17, 1974.