

Mr. Volpe
PLMI

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DECISION



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

B-214659

FILE:

DATE: FEB. 12, 1985

MATTER OF:

Janet L. Apple - Computation of Backpay
Following Erroneous Separation

DIGEST:

1. Restored air traffic controller claims entitlement to retroactive promotion during period of removal. Claim is denied since the facts do not clearly establish she would have completed training and certification requirements necessary for promotion to next grade level.
2. Restored air traffic controller objects to agency's deduction of lump-sum annual leave payment and refunded retirement contributions from backpay award. Deductions are required since the employee was reinstated under the Back Pay Act as if the removal never occurred, and thus there is no basis for payment of lump-sum annual leave or refund of retirement contributions.
3. Restored air traffic controller claims entitlement to overtime compensation as part of backpay award. Proper computation of overtime is the subject of lawsuit pending in federal court and in an action before the Merit Systems Protection Board (MSPB). We will defer action on this claim pending resolution of the actions in federal court and before the MSPB.
4. Restored air traffic controller claims entitlement to premium pay for on-the-job training supervision during period of removal. Claim is denied since she was not qualified as a journeyman controller who could be selected to perform on-the-job training prior to her separation and since selection for such training is not a right nor is it guaranteed.

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ISSUES

The issues in the decision involve an employee's claims for retroactive promotion, premium pay, and overtime pay during the period she was improperly removed from her position. For the reasons stated below, we deny the employee's claims for a retroactive promotion and premium pay, and we defer action on her claim for overtime compensation since the computation of such overtime is a matter pending in other forums.

The employee also objects to the agency's deduction of her lump-sum annual leave payment and repayment for refunded retirement contributions from her backpay award. We hold that such deductions are required where the employee is reinstated under the Back Pay Act.

BACKGROUND

This decision is in response to a claim by Ms. Janet L. Apple for backpay following her successful appeal of her separation from a position as an air traffic controller. Ms. Apple is represented in this claim by Mr. Rex B. Campbell.

Ms. Apple was separated from federal service in September 1981, for alleged participation in the strike by certain air traffic controllers. However, on August 19, 1983, the Merit Systems Protection Board (MSPB) reversed Ms. Apple's removal and ordered her reinstatement. The Federal Aviation Administration (FAA) reinstated Ms. Apple on October 11, 1983, and this dispute involves the computation of her backpay.

Ms. Apple contends that she is entitled to a retroactive promotion to grade GS-13 in April 1982, during the period of the erroneous separation. She contends that she would have met the time-in-grade, training, and certification requirements for promotion to grade GS-13, but for the FAA's unjustified separation action.

Ms. Apple also contends that upon reinstatement she is not required to refund her lump-sum annual leave and therefore, the lump-sum payment should not be deducted from her backpay award. Similarly, she argues that her lump-sum retirement contribution need not be refunded and should not be deducted from her backpay award. Finally, Ms. Apple claims overtime pay as part of her backpay award, citing our decision in Ronald J. Ranieri, B-207997.2, August 23, 1983. In addition to the claim for overtime pay, she claims 10 percent premium pay for on-the-job training and

supervision she would have performed during the period of her removal.

The FAA denied Ms. Apple's claim for a retroactive promotion since promotions from grade GS-12 to grade GS-13 are not automatic or guaranteed and are contingent upon successful completion of all required training courses and certification requirements. The agency report states that it is not clear that "but for" the erroneous removal action, Ms. Apple would have been promoted to the grade GS-13 position.

The FAA also denied Ms. Apple's claims regarding her lump-sum annual leave payment and lump-sum retirement contribution arguing that by canceling the removal action, there is no basis for making the lump-sum payment for annual leave or refunding the retirement contributions.

With regard to the claim for overtime compensation, the FAA deferred any decision on computing the amount of overtime since the issue is pending in court. See Shelleman v. Dole, No. 83-3740 (D.D.C. filed December 15, 1983). The agency also denied retroactive payment of on-the-job training premium pay since, at the time of her removal, she had not yet qualified as a journeyman controller and, therefore, it is not certain that she would have been selected to perform on-the-job training of less experienced controllers.

OPINION

Retroactive Promotion

Under the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1982), an employee, upon correction of an unwarranted or unjustified personnel action, is entitled to all pay, allowances, or differentials which the employee would have earned or received during the period of the improper action. See also 5 C.F.R. Part 550, subpart H (1984). Backpay awards may include retroactive promotions which were not implemented as a result of improper removal. See George F. Ackley, B-214828, October 11, 1984, and court cases cited. However, as we held in Ackley, the retroactive promotion must be based on facts which clearly establish that the employee would have been promoted during the period of removal but for the unjustified or unwarranted personnel action.

There is no clear indication that Ms. Apple would have been promoted to the grade GS-13 level in April 1982. She argues that but for the improper separation she would have completed the necessary training for the grade GS-13

level position and she would have met all certification requirements. But we believe Ms. Apple is conceding that at the time of her removal, she had not met all of the requirements for promotion to grade GS-13. In addition, the FAA states that promotions from grade GS-12 to grade GS-13 are not automatic or guaranteed. Therefore, since Ms. Apple had not met all of the requirements for promotion to grade GS-13 at the time of her improper separation, we hold that she is not entitled to a retroactive promotion to grade GS-13 during the period of removal.

Lump-sum annual leave payment

Under the provisions of 5 U.S.C. § 5551(a), an employee who is separated is entitled to lump-sum payment for annual leave. However, where the separation is determined to be erroneous under the Back Pay Act, the separation is treated as if it never had occurred and the employee is not entitled to retain the lump-sum payment received under section 5551(a). Vincent T. Oliver, 59 Comp. Gen. 395 (1980); and Federal Personnel Manual (FPM) Letter No. 550-76, July 15, 1982.

We are unpersuaded by Ms. Apple's argument that upon reemployment she may be required to refund the lump-sum payment only in accordance with the provisions of 5 U.S.C. § 6306. The distinction here is that Ms. Apple is not being reemployed, she is being retroactively reinstated following cancellation of an erroneous separation from federal service. By this action it is as if Ms. Apple was never separated from her position, and therefore was never entitled to lump-sum payment for her leave.

We do not know whether deduction of the lump-sum payment for annual leave from the backpay award might result in a net indebtedness to Ms. Apple. To the extent such deduction does result in a net indebtedness, that indebtedness may be considered for waiver under 5 U.S.C. § 5584 (1982). Angel F. Rivera, B-213539, November 20, 1984, 64 Comp. Gen. ____.

Retirement contributions

The same rationale applies to the deduction of refunded retirement contributions from the backpay award as for the lump-sum leave payment; that is, the separation is regarded as if it never occurred and the employee is not entitled to the refund of retirement contributions under 5 U.S.C. § 8342(a). Rivera, cited above, and FPM Letter 550-76,

cited above. Again, this is not a situation of reemployment of Ms. Apple, but instead it is retroactive reinstatement canceling the erroneous separation from federal service.

To the extent that deduction of the refunded retirement contributions from the backpay award results in a net indebtedness, we have held that such indebtedness is not subject to waiver under 5 U.S.C. § 5584 since it does constitute "an erroneous payment of pay or allowances" within the meaning of section 5584. Rivera, cited above. Such net indebtedness may be subject to waiver by OPM under the provisions of 5 U.S.C. § 8346(b) and 5 C.F.R. Part 831. See also OPM's proposed regulations published in 49 Fed. Reg. 45588 (November 19, 1984).

Overtime pay

Ms. Apple also claims overtime pay as part of her backpay award based on the overtime worked by similarly situated controllers who were not removed from their positions. She refers to our decision in Ranieri, cited above, holding that the FAA must pay overtime as part of the backpay awards to restored air traffic controllers.

As Ms. Apple contends, our decision in Ranieri held that restored air traffic controllers were entitled to overtime pay as part of their backpay awards even in the absence of a nondiscretionary policy governing the assignment of overtime. Our decision held further that the overtime pay could be computed based on the restored controllers' prior overtime experience or on the amount of overtime performed by similar employees who were not removed from their positions. Ranieri, B-207997.2, August 23, 1983.

Subsequent to our decision, the FAA elected to compute overtime based on each controller's prior overtime experience. However, that determination was later challenged in at least one lawsuit which is still pending in court. Shelleman, et al. v. Dole, et al., No. 83-3740 (D.D.C. filed Dec. 15, 1983). This class action lawsuit alleges that restored air traffic controllers are entitled to computation of their overtime based on the strike and post-strike overtime records of those controllers who were not fired.

It is the general policy of our Office not to issue a decision on a matter that is pending in court, unless requested to do so by the court. Therefore, we must decline to respond to Ms. Apple's claim for overtime compensation at this time.

We also note that the issue of the overtime computation for restored air traffic controllers is also pending before the MSPB. In an opinion dated October 25, 1984, involving restored air traffic controllers, the MSPB decided to review agency determinations involving backpay awards. Spezzaferro, et al. v. Federal Aviation Administration, No. BN 075281F0717 COMP. Thus, Ms. Apple may appeal the computation of her backpay award to the MSPB.

Additionally, Ms. Apple contends that she must be paid the overtime portion of her backpay award now as part of her total backpay award. This contention seems to be based on language in Ranieri, that overtime compensation "must be included in the backpay award." It was not our intent to require that in all cases all possible elements of a backpay award must be paid at the same time. Instead we meant that overtime compensation must be included, where otherwise appropriate, in the total backpay finally awarded. In cases such as this where there may be continuing litigation over some elements of a backpay award, we would have no objection to payment of those elements that are undisputed at the earliest practicable date with the remainder of the award to be paid at a later date.

On-the-job training pay

Finally, Ms. Apple claims entitlement to 10 percent premium pay for on-the-job training she would have performed during the period of her removal. As noted above, the FAA denied her claim on the basis that, at the time of her removal, she had not yet qualified as a journeyman controller and, therefore, it is not certain that she would have been selected to perform on-the-job training of less experienced controllers.

We find no entitlement to this premium pay for the same reasons that we denied entitlement to a retroactive promotion during the period of removal. Ms. Apple has not clearly established that she was qualified as a journeyman controller which would permit her to perform on-the-job training and qualify her for the applicable premium pay. As was the case with promotions, the FAA states that on-the-job training is not a right and selection to conduct such training is not guaranteed. Therefore, we find no basis to require payment of this premium pay as part of Ms. Apple's backpay award.

CONCLUSION

Accordingly, we deny Ms. Apple's claim for a retroactive promotion and on-the-job training premium pay as part of her backpay award. We also sustain the agency's action in deducting her lump-sum annual leave payment and lump-sum retirement contribution from her backpay award. Finally, we defer action on Ms. Apple's claim for overtime compensation as part of her backpay since the issue is pending in federal court as well as before the MSPB.

for 
Comptroller General
of the United States