The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Anthony M. Ragunas - Reduction in Force - Pay Retention - Discontinued Service Retirement

File: B-228998

Date: November 21, 1988

DIGEST

1. Agency abolished employee's position of Quality Assurance Specialist, GS-12, effective November 17, 1981, and offered employee a wage grade position in lieu of separation by reduction in force (RIF). Employee was erroneously notified that acceptance of Laborer position would include indefinite retention of GS-12 pay. Employee elected the lower grade position, rather than discontinued service retirement pursuant to RIF. In January 1984, employee was notified that GS-12 pay was not indefinite, but would be reduced retroactively to November 19, 1983. Employee is not entitled to pay of GS-12 position beyond statutory period of 2 years. Notice by agency official to contrary does not provide a basis to allow him additional compensation. Government cannot be bound beyond the actual authority conferred upon its agents by statute or regulations.

2. Employee who accepted lower grade position after receiving a reduction-in-force (RIF) notice contends that the agency did not follow the proper procedures in conducting the RIF. This Office cannot consider the employee's contention because challenges to agency RIF actions must either be processed through a negotiated grievance procedure, if applicable, or presented to the Merit Systems Protection Board.

3. A retired civil service employee requests that his separation date be changed retroactively so that he may accept a discontinued service retirement pursuant to reduction-in-force notice. Employee alleges that his electing to forgo discontinued service retirement in November 1981 resulted from erroneous advice that saved pay would be indefinite. Agency may retroactively change employee's date of separation and submit request for retroactive discontinued service retirement to the Office of Personnel Management where agency incorrectly advised

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employee whose position was abolished that he would receive GS-12 pay indefinitely. The failure of agency to give employee correct information as to consequences of refusing separation and discontinued service retirement constituted administrative error which deprived him of right granted by statute and regulation to elect discontinued service retirement.

DECISION

Mr. Anthony M. Ragunas, a retired employee of the Army Transportation Center, Fort Eustis, Virginia, appeals our Claims Group's denial of his claim for additional pay retention and compensation incident to his transfer to a lower graded position. His claim is founded on the basis of erroneous information he received from government personnel officials at the time of a reduction in force (RIF) which deprived him of certain options he had available to him such as a discontinued service retirement or a legal challenge to the RIF procedures. We affirm the action of our Claims Group,1/ but on the basis of administrative error we hold that the agency may retroactively change employee's separation date to the effective date of the RIF.

BACKGROUND

On September 18, 1981, Mr. Ragunas, a Quality Assurance Specialist, GS-12, received notification that his position was to be abolished effective November 17, 1981, and that he was being offered the position of Laborer, WG-2 in lieu of separation by RIF. Subsequently, the Army upgraded its offer of continuing employment from Laborer, WG-2, to Insulator Helper, WG-5. The notification stated that acceptance of the position would include "a two-year period of grade retention followed by a period of indefinite pay retention." Mr. Ragunas reports that the period of "indefinite pay retention" was explained to him by officials of the Fort Eustis Civilian Personnel Office to mean that his pay would never be less than the pay at the GS-12, step 4, level that he was receiving at the time of the RIF notification. The notification further informed Mr. Ragunas that if he declined the offer of the position, he would be separated by a RIF effective November 17, 1981, which would result in a discontinued service retirement, for which he was eligible for as a result of his years of service and age.

1/ Z-2816623, Aug. 17, 1987.

Mr. Ragunas accepted the upgraded offer on October 8, 1981, with an effective date of November 17, 1981, and thereby declined an immediate discontinued service retirement annuity. Mr. Ragunas emphasizes that although he was reluctant to go "from an office environment to a hard manual labor position at age 54, I accepted the job offer only with the firm understanding that I would retain my GS-12 rate of pay indefinitely."

On April 4, 1983, Mr. Ragunas received a further reduction in grade as a result of another RIF. He was placed in a Store Worker, WG-4, position. This action entitled Mr. Ragunas to a second two-year grade retention period ending April 3, 1985, based on the WG-5 position. On November 17, 1983, the Fort Eustis Civilian Personnel Division processed a personnel action terminating Mr. Ragunas' original period of grade retention. However, this personnel action failed to reduce Mr. Ragunas' salary from $34,269, GS-12, step 6, in accordance with 5 U.S.C. § 5363 (1982). Under section 5363 Mr. Ragunas was only entitled to basic pay at a rate equal to 150 percent of the maximum rate of basic pay payable for the grade of his new position. See generally 5 C.F.R. § 536.205 (1983). Because of this administrative error, Mr. Ragunas was overpaid for several months in the gross amount of $1,982.08. On February 2, 1984, Mr. Ragunas was notified of this overpayment, and the personnel action terminating his grade retention was corrected to reflect the correct salary.

In April 1983, Mr. Ragunas had started his new Store Worker, GS-4, position stocking canned goods at the Fort Eustis Commissary. In October 1983, Mr. Ragunas began experiencing back problems which resulted in light duty status in December 1983 and ultimately to an involuntary disability retirement which was approved in March 1984. Mr. Ragunas was relieved of his duties at the Commissary on March 9, 1984, and placed on terminal sick leave until his sick leave was exhausted on May 29, 1985, on which date Mr. Ragunas was officially retired.

Mr. Ragunas states that as a result of his being mislead and mainformed concerning his pay retention rights he was deprived of his right to exercise his option in November 1981 to receive a discontinued service retirement. He stresses that his waiver of his right to a retirement annuity in 1981 was predicated on the misleading and erroneous advice he received from the Civilian Personnel Office. The Fort Eustis Personnel Office does not deny the characterization of its advice by Mr. Ragunas. The Personnel Office's subsequent failure in November 1983 to reduce Mr. Ragunas' salary supports the proposition that it did

not understand the pay retention authority. Mr. Ragunas notes that his failure to have the opportunity to make an informed decision to accept the discontinued service retirement in November 1981, has been very costly to him financially in lost pay, sick leave, reduced life insurance, lowered annuity when retirement ultimately did take place, and in greatly impaired health.

OPINION

Pay Retention

Under section 5363(a)(1) and (b) an employee who ceases to be entitled to grade retention under 5 U.S.C. § 5362 by reason of the expiration of the 2-year period becomes entitled to a period of pay retention. This statute provides a specific formula for computing an employee's retained pay. Under section 5363(b) an employee is entitled to the lesser of (1) the rate of basic pay payable to the employee immediately before the reduction in pay (GS-12, step 6, in Mr. Ragunas case), or (2) 150 percent of the maximum rate of basic pay payable for the grade (WG-5 for Mr. Ragunas) of the employee's position immediately after such reduction in pay. Since 150 percent of the WG-5 position was less than the rate of pay for a GS-12, step 6, the 150 percent of the WG-5 position was all that Mr. Ragunas was entitled to by statute in November 1983 after the expiration of his 2-year grade retention period under 5 U.S.C. § 5362 (1982).

While it is unfortunate that Mr. Ragunas was given incorrect information as to his entitlement to pay retention upon notification of proposed RIF action in September 1981, that error does not provide a basis to allow him any additional compensation not otherwise authorized by statute. It is well-settled that the government cannot be bound beyond the actual authority conferred upon its agents by statute or regulations, and this is so even though the agent may have been unaware of the limitations on his authority. See M. Reza Fassihi, 54 Comp. Gen. 747, 749 (1975), and court cases cited therein. The government is not estopped from repudiating advice given by one of its officials if that advice is erroneous. See Joseph Pradarits, 56 Comp. Gen. 131, 136 (1976).

RIF Procedures

Mr. Ragunas also contends that as a result of the erroneous information he was given that he forwent any opportunity to challenge the legality of the RIF procedures. This Office does not have jurisdiction to consider this contention. An

employee claiming that an agency did not use proper RIF procedures must either pursue the matter through a negotiated grievance procedure, if available, or file an appeal with the Merit Systems Protection Board. See 5 C.F.R. § 351.901. See also FPM, ch. 351, S7 (Inst. 263, July 7, 1981). Carmen G. Benabe and Howell E. Bell, B-226833, Aug. 10, 1987, 66 Comp. Gen. ___.

Retroactive Discontinued Service Retirement
On Increased Annuity

Mr. Ragunas has also requested that our Office consider granting him a retroactive discontinued service annuity or increasing the amount of his current annuity.

The Office of Personnel Management is by law vested with exclusive authority to adjudicate civil service annuity claims arising under 5 U.S.C. §§ 8331-8348, subject solely to administrative review by the Merit Systems Protection Board. See 5 U.S.C. § 8347. Hence, we are without jurisdiction to review and render an authoritative decision on any claim Mr. Ragunas has asserted for a retroactive discontinued service retirement annuity or an increase in his disability retirement annuity.

Authorization Of Retroactive Separation Date

In cases where an employee claims entitlement to a retroactive separation, this Office has jurisdiction to rule on whether a retroactive separation date can be authorized. If our Office authorizes a retroactive separation date, Mr. Ragunas would be treated as having retired on November 17, 1981, and as having served as a reemployed annuitant thereafter, assuming that OPM otherwise agreed that he qualified for a discontinued service annuity under 5 U.S.C. § 8336(d) (1982).

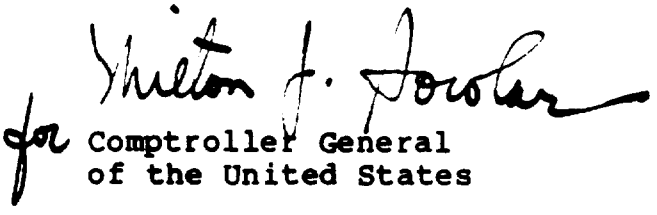
Exceptions are made to the general rule against retroactive personnel actions ". . . where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation." Douglas C. Butler, 58 Comp. Gen. 51, 53 (1978). See also 55 Comp. Gen. 42 (1975); 54 Comp. Gen. 888 (1975).

This Office has previously permitted the retroactive changing of the separation date of an employee where the employee's separation did not conform to the intent of the parties. Perry L. Peterson, B-207676, Dec. 21, 1982;

B-159889, Sept. 1, 1966. Additionally, we have permitted the retroactive changing of an employee's separation date where the agency committed an administrative error by granting the employee terminal leave and advising her that she would continue to earn annual leave during that period. B-167146, July 31, 1969. Finally, in a case that is closely analogous to Mr. Ragunas', we allowed a retroactive separation date where two employees had been deprived of their right to elect discontinued service retirements because of erroneous advice by the employing agency. Dale Ziegler and Joseph Rebo, B-199774, Nov. 12, 1980.

It is undisputed that the Army erroneously advised Mr. Ragunas that if he accepted continued employment in a Laborer position in November 1981, he would continue to receive his GS-12, step 4, salary indefinitely. The record is persuasive that if Mr. Ragunas had received legally correct advice on his future salary, he would not have declined a discontinued service annuity in November 1981. It is clear that Mr. Ragunas' decision to elect continued employment was predicated upon the erroneous advice he was officially given concerning his salary protection. The failure to advise Mr. Ragunas properly had the effect of depriving Mr. Ragunas of his right to elect a discontinued service retirement.

Accordingly, we hold that the Army may retroactively separate Mr. Ragunas as of November 17, 1981, in order to allow the Army to apply to the Office of Personnel Management for a ruling as to whether Mr. Ragunas would now qualify for a retroactive discontinued service retirement effective November 17, 1981. See paragraph S11-3, subchapter S11 of Federal Personnel Manual Supplement 831-1.



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