

# DECISION



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

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FILE: B-182877

DATE: JUN 9 1975

MATTER OF: Mr. Alec H. Stratton--Retroactive correction of appointment action

## DIGEST:

Retroactive correction of an appointment date may be accomplished under provisions of Back Pay Statute, 5 U.S.C. § 5596 (1970) and implementing regulations where agency committed a procedural error by failing to follow provisions of administrative regulations requiring that retirement and reappointment be included in same action to preclude a break in service which was not intended, and where the break in service was only one nonworkday.

This matter concerns the question as to whether the Kansas Air National Guard has authority to effect a retroactive correction of an appointment action in the case of Mr. Alec H. Stratton, a retired employee of that agency.

Mr. Stratton was retired from Forbes Air National Guard Base, Kansas, on Saturday, June 30, 1973. At the time of retirement, his agency apparently planned to immediately reemploy him under a temporary appointment. However, the reemployment appointment was not made effective as of the day following retirement which was a Sunday, but rather was made effective as of the following day, Monday, July 2, 1973, which caused Mr. Stratton to have a one day break in service. The employee worked under his temporary appointment and extensions thereof until June 30, 1974, when he was separated. He applied for a supplemental annuity which was disapproved on the basis that his temporary appointments did not cover a full year period of continuous service as required by 5 C.F.R. 831.801(d)(3). Computation of the employee's last period of service revealed that he was one day short of the full year service requirement. Apparently, Mr. Stratton was not aware that he had experienced a one day break in service on Sunday, July 1, 1973.

The employee protested the disapproval of his supplemental annuity on the ground that the period in question did cover a full year of work days. The agency sought guidance on the matter from the St. Louis, Missouri, Regional Office of the Civil Service Commission. The Commission reviewed the case and advised that a procedural error was apparently committed by the agency in having Mr. Stratton experience the one day break in service at the time he was reemployed. It was pointed out that his retirement and temporary

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appointment should have been processed as one action with an effective date of Sunday, July 1, 1973, pursuant to Federal Personnel Manual Supplement 296-31, Book V, Table 4, § 1-3 (March 31, 1969), which provides in pertinent part as follows:

"1-3. GENERAL INSTRUCTIONS FOR APPOINTMENTS  
AND CONVERSIONS TO APPOINTMENTS

"a. Nature of Action.

"(1) Mandatory use of conversion terms.

"(a) Except as provided in (2), below, the conversion terms prescribed in this table must be used on SF 50 when an employee on an agency's rolls is given a new appointment in his same agency without a break in service. The conversion term must, in such cases, be used instead of reporting a separation and a new appointment, whether the change to the new appointment is:

"—Within the same agency appointing office or between appointing offices of the same agency;

"—To the same or a different kind of appointment; or

"—In the same or to a different position.

('Same agency' for this purpose means the entire agency such as Army; Air Force; Department of Transportation; Department of Health, Education, and Welfare; Department of Housing and Urban Development.)

"(b) Mandatory use of the conversion term is prescribed in the above cases to avoid issuing two SF's 50 and to assure a more accurate total employment count for the agency as a whole.

"(c) The employee must meet the requirements for the new appointment and the agency must have the appropriate authority to make the new appointment.

Caution: An employee's appointment must not be converted to another appointment under which he will have less rights and benefits until he has:

"—Been informed of the conditions of employment under the new appointment; and

"—Submitted a written statement to the effect that he is leaving his previous employment voluntarily to accept the conversion to the new appointment.

In addition, if the employee is leaving a non-temporary appointment in the competitive service to accept an appointment in the excepted service (see FPM Ch. 302, Subch. 2):

"—He must also be informed that because the position is in the excepted service it may not be filled by competitive appointment and that his acceptance of the proposed appointment will take him out of the competitive service while he occupies the position; and

"—His statement must clearly show that he is leaving the competitive service voluntarily to accept conversion to an appointment in the excepted service.

(The employee's statement is filed in his Office Personnel Folder as back-up for the conversion to the new appointment.)

"(2) Exception to mandatory use of conversion terms. When a new appointment in the same agency follows a retirement separation without a break

in service, effect both a separation and a new appointment. Both actions may be recorded on the same SF 50, using the appropriate personnel action code and term for the retirement separation and the appropriate code and term for the new appointment. For example, if the employee was separated by mandatory retirement on June 30, 1968, and was appointed the following day by temporary appointment based on reinstatement eligibility, the nature of action box would show:

"'300 Retirement—Mandatory 06-30-68  
115 Temp Appt NTE 6-30-69—Reempl Ann'

and 07-01-68 would be shown in the effective date box as the date of the appointment. \* \* \*

From the above-quoted instruction, it appears that the agency erred in failing to include the separation and new appointment in the same personnel action to preclude the break in service that occurred in this case. The agency recognizes the procedural error in as much as there was no intent to have a break in service in the action and seeks advice from this Office concerning what, if any corrective action it may take to retroactively correct this error in appointment.

The general rule of law applicable to appointments is that they are effective only from the date of acceptance and entrance on duty after the appointing authority exercises his discretion. Hence an appointment may be made effective on a date subsequent, but not previous, to the date such discretion was exercised. 8 Comp. Gen. 582 (1929); 24 *id.* 150 (1944). From the material submitted, it would appear that the appointing authority had actually exercised his discretion to appoint Mr. Stratton on Monday, July 2, 1973, after he retired on Saturday, June 30, 1973. It would also appear that the agency failed to comply with applicable administrative regulations, in that the appointment was not properly included and recorded in the retirement personnel action of June 30, 1973, so as to avoid a break in service for the employee, which it did not intend.

The statutory authority for correcting unjustified and unwarranted personnel actions that result in the withdrawal or reduction of all or a part of the pay, allowances or differentials of Federal employees is contained in the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), which provides in pertinent part:

"§ 5596. Back pay due to unjustified personnel action

\* \* \* \* \*

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action has not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of leave authorized for the employee by law or regulation.

"(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees."

The Civil Service Commission has promulgated regulations for the above-quoted statute in 5 C.F.R., Part 550, subpart H. Subsections 550.803(d) and (e) set forth the criteria of an unjustified or unwarranted personnel action as follows:

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"(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

"(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter."

The action in this case did not result in a loss of pay since Sunday was a nonworkday. However, it did result in the loss of service credit for one day and that loss prevented recomputation of Mr. Stratton's annuity which is based on such service. In view of this we are of the opinion that the agency's failure to follow proper administrative procedure that directly resulted in the employee sustaining a one day break in service comprising a nonworkday is a procedural defect which constitutes an unjustified or unwarranted personnel action as contemplated by the above-quoted statute and regulations. See B-175373, April 21, 1972. Support for this contention is found in the legislative history of the Back Pay Act of 1966, supra, contained in S. Rep. No. 1062, 89th Cong., 2d Sess. 3 (1966), that states in part:

"4 H.R. 1647 does not prescribe the specific types of personnel actions covered. Separations, suspensions, and demotions constitute the great bulk of cases in which employees lose pay or allowances, but other unwarranted or unjustified actions affecting pay or allowances could occur in the course of reassignments and change from full-time to part-time

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work. If such actions are found to be unwarranted or unjustified, employees would be entitled to backpay benefits when the actions are corrected." (Emphasis added.)

This legislative history indicates that procedural errors, that result in unjustified or unwarranted personnel actions, occurring in connection with personnel status changes are covered by the Act.

Accordingly, appropriate corrective action, to include a retroactive adjustment of the employee's reappointment date, may be accomplished in accordance with Civil Service Commission regulations contained in 5 C.F.R. 550.804.

R.F.KELLER

Deputy } Comptroller General  
of the United States