

DOCUMENT RESUME

02587 - [A1812860]

[Saved Pay and Backpay: Reconsideration of Claim]. B-187221.
June 21, 1977. 9 pp.

Decision re: Wayzetta M. Hoffman; by Robert F. Keller, Deputy
Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation
(305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel
Management (305).

Organization Concerned: Department of the Navy: Alameda Naval
Air Station, CA.

Authority: Back Pay Act (5 U.S.C. 5596). (P.L. 84-594; 70 Stat.
291). 5 U.S.C. 1107(a). 5 C.F.R. 550.803. 5 C.F.R. 351.907
et seq. 42 Fed. Reg. 16125. NAVCOMPT Instruction 7310.5.
SECNAV Notice (December 23, 1957). Navy Comptroller's
Manual, para. 035127. United States v. Testan, Docket No.
74-753, 44 U.S.L.W. 4245.

An appeal was made to the disallowance of an employee's
claim for saved pay and backpay incident to a grade reduction in
1964. The reduction was necessitated by a lack of funds,
vitiating saved pay claim. The Civil Service Commission held
that the employee's appeal of reduction 9 years earlier was
untimely. There was no backpay entitlement since no "appropriate
authority" determined reduction was unjustified. The prior
disallowance of the claim was affirmed. (Author/DJM)

Jessica Botsford
Civ. Pers.

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DECISION



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

FILE: B-187221

DATE: June 21, 1977

MATTER OF: Wayzetta M. Hoffman - Saved pay and backpay

- DIGEST:**
1. Employee reduced in grade in a 1964 reduction in force at the Alameda Naval Air Station is not entitled to saved pay under 5 U. S. C. § 1107(a) (1953) since the reduction in force was necessitated by a lack of funds. The evidence presented does not support employee's contention that her position was not funded by the Naval Air Station, but by the Bureau of Medicine and Surgery, which allegedly did not experience a shortage of funds.
 2. Where the Civil Service Commission held employee's appeal from reduction-in-force action 9 years earlier untimely and refused to entertain that appeal, employee is not entitled to backpay for reduction in grade incident to reduction in force since there has been no determination by the "appropriate authority," as required by 5 U. S. C. § 5596 (1970), that her reduction in pay was the result of an unjustified or unwarranted personnel action.

This decision is in response to an appeal by Wayzetta M. Hoffman from Claims Division Settlement Certificate No. Z-2446660, December 8, 1971, which disallowed her claim for saved pay, backpay and step increases. Based on the record submitted, we are unable to isolate a separate issue relating to Miss Hoffman's entitlement to any particular step increase and, therefore, assume that this part of her claim refers to those step increases to which she would be entitled incident to any backpay entitlement which she may have under 5 U. S. C. § 5596 (1970).

Miss Hoffman's claim for saved pay arises from the elimination of her GS-6, step 7, clerk position with the Medical Department, Alameda Naval Air Station, incident to a reduction in force. With the elimination of that position on January 27, 1964, Miss Hoffman

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was assigned to the position of Stock Control Clerk, GS-5, step 10. By letter dated February 5, 1971, she questioned the fact that she was not paid saved pay incident to her grade reduction. As a basis for her claim for such pay, Miss Hoffman cited the Act of June 18, 1956, Pub. L. 84-594, 70 Stat. 291.

Settlement Certificate No. Z-2446660, December 8, 1971, denied Miss Hoffman's claim for saved pay, explaining that at the date of the reduction-in-force action the saved pay authority had been amended to provide saved pay for employees excluding, among others, those whose reductions in grade were effected in a reduction in force due to lack of funds and that the 1964 reduction in force at the Alameda Naval Air Station had been necessitated by just such a lack of funds. As in effect on January 27, 1964, section 1107(a) of title 5, United States Code (1958 edition), provided:

"§ 1107. Preservation of basic compensation in down-grading actions.

"(a) Persons reduced in grade after June 17, 1956.

"Subject to the limitation contained in subsection (c) of this section, each officer or employee subject to this chapter--

* * * * *

"(3) whose reduction in grade is not or was not caused by a demotion for personal cause, is not or was not at his own request, is not or was not effected in a reduction in force due to lack of funds or curtailment of work and, with respect to each temporary promotion occurring on or after September 21, 1961, is not a condition of his temporary promotion to a higher grade;

* * * * *

shall be entitled, as of the effective date of such reduction in grade or as of the first day of the first pay period which begins after August 23, 1958, whichever is later, unless or until he is entitled to receive basic compensation at a higher

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rate by reason of the operation of this chapter, or until the expiration of a period of two years immediately following the effective date of such reduction in grade or immediately following the first day of such first pay period, as applicable, to receive the rate of basic compensation to which he was entitled immediately prior to such reduction in grade * * *."

In appealing from the Claims Division settlement, Miss Hoffman takes the position that she is nonetheless entitled to backpay since her salary was not funded by the Alameda Naval Air Station, but was the responsibility of the Bureau of Medicine and Surgery. In support of this position she has forwarded a copy of NAVCOMPT Instruction 7310.5, May 29, 1956. She directs our attention to the following language of that instruction:

"b. Direct charges. Direct charges applicable to medical and dental facilities will be accumulated by expenditure account, or by job order when required below the expenditure account level. * * * Direct charges normally will be accumulated under the following:

"Medical facilities (labor and supplies): The pay of civilian employees, including contract physicians, involved in the administration and operation of medical facility. The cost of medical and other consumable supplies used in the administration and operation of the medical facility."

The above-quoted language appears to be merely an accounting directive indicating that the pay of civilian employees is to be considered a direct charge for "Medical facilities."

More in point is subparagraph 5 of the instruction, indicating that the share of the maintenance and operating costs related to care of civilian employees is the financial responsibility of the management bureau and that the portion related to care of military personnel and their dependents is the financial responsibility of the Bureau of Medicine and Surgery. While this language would suggest that certain salary costs were once the responsibility of the Bureau of Medicine and Surgery, that instruction was not in effect in 1964 at the time of

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Miss Hoffman's reduction in grade. On December 23, 1957, it was cancelled by SECNAV Notice 5215. We have contacted the Office of the Comptroller of the Bureau of Medicine and Surgery and have been advised that prior to 1957 some portion of the funding for medical facilities at Navy installations was in fact borne by the Bureau of Medicine and Surgery, but that in 1957 funding responsibility was shifted to the management bureaus. In 1964, funding for the Medical Department at the Alameda Naval Air Station was the responsibility of the Bureau of Naval Weapons, as evidenced by the statement contained at paragraph 035127 of the Navy Comptroller's Manual, then in effect, that "financial responsibility for all cost of operation and maintenance of medical and dental facilities located at field activities not under the management control of the Bureau of Medicine and Surgery is placed in the respective management bureaus." We understand that this funding responsibility continued into the early 1970s when it was again shifted to the Bureau of Medicine and Surgery. Based on this information we are unable to conclude that Miss Hoffman's reduction in grade was the result of other than a reduction in force due to lack of funds. Under 5 U.S.C. § 1107(a) as in effect on January 27, 1964, she, therefore, is not entitled to saved pay in connection with her reduction in grade. Our Claims Division's determination in this regard is sustained.

The basis for Miss Hoffman's claim for backpay is somewhat unclear. The record indicates that she feels the reduction-in-force action that resulted in her reduction in grade to GS-5, step 10, was improper, but there is no specific allegation as to the nature of that impropriety. Our Claims Division, in its Settlement Certificate of December 8, 1971, advised Miss Hoffman that the Back Pay Act as codified at 5 U.S.C. § 5596 (1970) provides that when an administrative determination is made that an employee has undergone an unjustified or unwarranted personnel action resulting in a reduction in his pay, he is entitled, upon correction of that action, to the pay he would have received if the improper personnel action had not occurred. As there had been no finding by appropriate authority that the reduction-in-force action effecting her reduction in grade constituted an unjustified or unwarranted personnel action, Miss Hoffman's claim for backpay was denied.

Our Claims Division subsequently advised Miss Hoffman's attorney that the "appropriate authority" to make the necessary determination under 5 U.S.C. § 5596 is the administrative agency and/or the Civil Service Commission, and that further inquiry concerning the matter

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should be made to the Civil Service Commission. Her attorney now asserts that this Office has jurisdiction to award backpay to Miss Hoffman independent of any determination by the Civil Service Commission. His argument is as follows:

"On December 8, 1971 you sought to disallow the claim. Not on the basis of lack of jurisdiction, which you now assert, but because you held it unenforceable per se.

* * * * *

"On November 14, 1972, * * * you for the first time mentioned the 'appropriate authority', but did not indicate who it is.

* * * * *

"On February 13, 1974 you wrote claimant's then attorney, continuing to assert your jurisdiction in this matter.

"On April 23, 1974 you for the first time treated the claim as a jurisdictional one.

"It seems completely unreasonable to assert, after three years of negotiation and extended correspondence, that you are the wrong person to be talking to. The United States Civil Service Commission ruled only on the timeliness of the appeal to it, and that matter is still pending.

"Miss Hoffman's claim to you does not rest directly upon any reduction in force determination, but upon her backpay, saved pay and step increase entitlements. This is clearly within your jurisdiction."

The Back Pay Act authority of 5 U. S. C. § 5596 is remedial in nature, providing a remedy for wrongful reductions in grade, removals and suspensions and other unjustified or unwarranted actions affecting pay or allowances. See United States v. Testan, Docket No. 74-753, 44 U. S. L. W. 4245, decided by the Supreme Court on March 2, 1976.

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By its express terms it provides a remedy only when it has otherwise been determined that the employee has suffered a reduction in pay as the result of an unjustified or unwarranted 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 had 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 the leave authorized for the employee by law or regulation."

The Civil Service Commission regulations implementing the Back Pay Act are published at 5 C.F.R. Part 550, subpart H and, as amended March 25, 1977, at Volume 42, page 16125 of the Federal Register, provide:

"§ 550.803 Determining entitlement.

"(a) An unjustified or unwarranted personnel action can only be corrected under the provisions of section 5596 of title 5, United States Code, if

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it is found by appropriate authority that the withdrawal, reduction, or denial of all or part of the pay, allowance, or differential due an employee was the clear and direct result of, and would not have occurred, but for the unjustified or unwarranted personnel action.

(b) The requirement for an 'administrative determination' in section 5596 of title 5, United States Code, is met when appropriate authority, as defined in paragraph (d) of this section, finds that an agency has taken a personnel action it was prohibited from taking, has taken a personnel action not authorized by law or regulation, or has not taken a personnel action it was required to take. Such determination shall always be in writing.

(c) The requirement for a 'timely appeal' referred to in section 5596 of title 5, United States Code, is met when an employee or personal representative initiates a claim to the Comptroller General for settlement of his or her claim against the Government, or an appeal or grievance under an appeal or grievance system including appeal procedures included in a collective bargaining agreement, and that claim is accepted as timely filed by the Comptroller General, or that appeal or grievance is accepted as timely filed by the Government authority administering the appeal or grievance system, or is found to be timely filed by an appropriate authority, e.g., an arbitrator, the Assistant Secretary of Labor for Labor Management Relations or a court having jurisdiction.

(d) The 'appropriate authority' referred to in section 5596 of title 5, United States Code, is (1) a court having jurisdiction; (2) the Comptroller General; (3) the Civil Service Commission; (4) an administrative authority designated in Executive Order 11491, as amended, or Executive Order 11636 (including a duly constituted grievance board); (5) the head of the employing agency or an agency official

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to whom corrective action authority is delegated;
or (6) an arbitrator in binding arbitration cases.

"(e) A personnel action, to be unjustified or unwarranted, must be determined by an appropriate authority to be improper or erroneous on the basis of either substantive merit or procedural defects.

"(f) The requirement for 'correction of the personnel action' in section 5596 of title 5, United States Code, is met when appropriate authority, consistent with law, Executive order, regulation, or collective bargaining agreement, after a review, makes or directs the correction of an unjustified or unwarranted personnel action."

In the case of an employee who has suffered a reduction in pay as the consequence of a reduction-in-force action, the Civil Service Commission is the appropriate authority, having power to require correction of the personnel action under the procedures now set forth at 5 C. F. R. §§ 351.901, *et seq.* (1977). A similar procedure, providing for timely appeals from reduction-in-force actions, was in effect in 1964 when Miss Hoffman was reduced in grade.

By letter of January 7, 1974, the Civil Service Commission's Board of Appeals and Review refused to consider Miss Hoffman's reduction-in-force appeal. The basis for that appeal, initiated 9 years after the action in question, was Miss Hoffman's contention that she had submitted a timely appeal on December 6, 1963, to which she received no response, evidencing the fact that her appeal had been misplaced by the Civil Service Commission's San Francisco Regional Office. The Board of Appeals and Review found that the San Francisco Regional Office had properly declined to consider Miss Hoffman's 1973 appeal, predicating that determination on the appellant's lack of diligence in pursuing the appeal. The Board thus held:


"* * * The Board agrees with the Regional Office that the lack of documentation or evidence of correspondence between the appellant and the Regional Office prior to the present appeal is strong evidence that the December 6, 1963, appeal was never in fact

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filed. Additionally, assuming that the appellant learned in October of 1964 that the Region had no record of her appeal, in the Board's judgment she has submitted no satisfactory evidence as to why she failed to pursue the exercise of her appeal rights for approximately nine additional years. After due consideration of all of the evidence, the Board of Appeals and Review finds that since there is no record of an earlier appeal and since the June 28, 1973, appeal is untimely by over nine and one-half years, the Regional Office properly declined to accept the appeal."

We understand from Miss Hoffman's attorney that the Board of Appeals and Review's determination has since been confirmed by the Civil Service Commission.

Since there has been no determination by the Civil Service Commission that Miss Hoffman's loss of pay due to her reduction in grade was the result of an unjustified or unwarranted personnel action, she is not entitled to backpay under 5 U.S.C. § 5596. The determination by our Claims Division denying Miss Hoffman's claim for backpay is therefore affirmed.


Deputy Comptroller General
of the United States