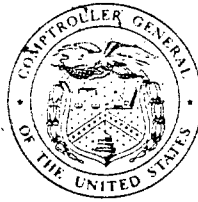


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DECISION

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

FILE: B-195259

DATE: October 29, 1979

MATTER OF: David R. Homan - [Claim for Backpay]

DIGEST: Individual hired by the Army after determination by Civil Service Commission that he had been improperly denied consideration for competitive civil service position is not entitled to backpay for the period prior to his actual appointment. The individual did not have a vested right to the appointment and since the Army retained administrative discretion with respect to filling the position until it exercised that discretion by appointing him effective January 4, 1978, he is not entitled to backpay for the period prior to his appointment.

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This decision is in response to a request from Mr. David R. Homan for reconsideration of our Claims Division's settlement of March 16, 1979, by which his claim for backpay based on delays in effecting his appointment to a position with the Department of the Army was denied. Although the Civil Service Commission found that administrative errors had resulted in the Army's failure to include Mr. Homan as one of three applicants certified eligible for appointment, those errors do not provide a basis to retroactively effect his appointment and to award him backpay.

On January 30, 1976, Mr. Homan, seeking employment as an engineer, submitted a Standard Form 171 to the Denver Area Office of the Civil Service Commission (now Office of Personnel Management). On August 13, 1976, while away from his home, he received an Inquiry as to Availability which had originally been sent to his former address even though he had notified the Denver office of his move. Return was requested by August 16 but Mr. Homan's response was not received until August 19. As a result, he was excluded from consideration for the vacancy. On August 25, 1976, Mr. Homan wrote to The Civil Service Commission requesting an investigation into the circumstances surrounding his elimination as a candidate. On October 7, 1977, the Commission wrote to Mr. Homan stating that they had found he was "improperly denied consideration for a competitive civil service position through arbitrary and unfair procedures."

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Mr. Homan was ranked 7th on the certificate of 11 eligibles that Fort Carson used to fill the Supervisory General Engineer, GS-801-11 position. Upon investigation, the Civil Service Commission found that Fort Carson sent Inquiries as to Availability to the first 6 eligibles on the list on July 27, 1976, and allowed them 10 days, until August 6, 1976, to reply. After those persons failed to reply or declined further consideration, the other eligibles were sent Inquiries as to Availability on August 9, 1976, and were allowed only 7 days, until August 16, 1976, to reply. According to Fort Carson's usual practice, Mr. Homan, as an out of state candidate, should have been allowed 10 days to reply. Had this been the case, his reply would have been timely and he would have been one of the top three eligibles. Therefore, the Commission concluded that as of August 19 Mr. Homan was still a candidate and his removal from consideration violated the Commission's Rule of Three which provides that a selection for a vacancy shall be made from among the highest three eligibles. In addition, since he was a veteran and the actual appointee was not, the Commission found that Fort Carson violated the veteran preference rules.

The Commission directed Fort Carson to regularize the appointment by one of three methods and stated that the choice of which of the three to use was left to the agency's discretion. Fort Carson chose to hire Mr. Homan for the position for which he had originally applied and he was appointed on January 4, 1978.

Mr. Homan requested a retroactive appointment to September 13, 1976, with backpay including within grade increases from that date to the day he was hired, and the sick and annual leave he would have accumulated during that period. The Armed Forces Command, Fort McPherson, Georgia, denied his request, as did our Claims Division, on the grounds that he had not undergone an unjustified or unwarranted personnel action within the terms of the Back Pay Act, 5 U.S.C. 5596 (1970). Mr. Homan claims that not only are the errors made by Fort Carson unjustified and unwarranted personnel actions, but that the 13 month delay in the Civil Service Commission's investigation was also unjustified and unwarranted.

In general, an appointment is effective from the date of acceptance and entrance on duty, but there are limited circumstances in which appointments to Federal employment may be made retroactively. As set forth at 42 U.S.C. 2000e-16(b), the Equal Employment Opportunity Act of 1972 gave the Civil Service Commission authority to order an agency to hire an employee with backpay if it determines that he was

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not selected on the basis of discrimination because of race, color, religion, sex or national origin. The remedy provided by that Act extends to applicants for employment as well as to employees.

Unlike the Equal Employment Opportunity Act, the Back Pay Act, 5 U.S.C. 5596, is applicable only to employees and provides a remedy for instances in which an employee is found to have undergone an unwarranted or unjustified personnel action which has resulted in the withdrawal or reduction of all or a part of his pay, allowances or differentials. Because the Back Pay Act applies only to employees, the instances in which appointments may be effected retroactively and backpay awarded are restricted to those in which an individual has a vested right to employment status by virtue of statute or regulation. For example; in B-158925, July 16, 1968, we held that an agency's refusal to reemploy a reservist violated his statutory right to reemployment under 5 U.S.C. 3551, entitling him to benefits under the Back Pay Act. Similarly, in 54 Comp. Gen. 1028 (1975) we held that a reemployed annuitant's reappointment with a break in service could be made effective a day earlier to eliminate a break in service. In that case, the agency had violated a mandatory policy requiring reappointments following retirement to be effected without a break in service.

We have also recognized that an individual who has been duly appointed to a Federal position but who is improperly restrained from entering upon the performance of his duties is entitled to redress under the Back Pay Act. Our holding in B-175373, April 21, 1972, involved an individual who was initially advised that he had been selected for a position. He was wrongly informed that the offer of employment was being withdrawn and, upon reporting for duty on the date originally set, he was improperly restrained from entering upon duty. Based on the Civil Service Commission's determination that the individual was legally appointed as of the date he attempted to enter on duty and that the agency's action in preventing his entrance on duty was tantamount to an erroneous removal or discharge, we held that he was entitled to backpay from the date he properly should have been permitted to enter on duty.

In contrast, in cases where the official with appointment authority has not exercised his discretion to appoint an individual to a Federal position, there is no basis to appoint retroactively, even where the delay is due to administrative error. The holding in Raymond J. DeLucia, B-191378, January 8, 1979, involved an applicant for a position as Deputy U.S. Marshal who was first notified of his selection and given a reporting date. Through administrative error he was inadvertently

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notified that the offer of employment was withdrawn and, by the time the problem was resolved, his appointment had been delayed for almost 2 months. In holding that he was not entitled to backpay for that 2 month period prior to his actual appointment, we stated:

"* * * in the ordinary case the decision to appoint or promote an individual in the Federal service is left to the discretion of the employing agency, and we have held that in such case the agency's action in not hiring or promoting the individual on the date he expected or would have preferred, does not constitute an 'unjustified or unwarranted personnel action' under the Back Pay Act. This is so even though it appears that the appointment or promotion may have been delayed through error or an unusually heavy agency workload in the processing of personnel actions, since the employee in such case has no vested right under law or regulation to be appointed or promoted in any event. * * *"

Also see Leonard Ross, B-183440, August 12, 1975.

In Mr. Homan's case, there is no finding that the delay in effecting his appointment was the result of discrimination. Rather, the Civil Service Commission found that through administrative error, he was improperly eliminated from consideration under the Rule of Three and improperly passed over as a preference eligible. By way of corrective action, it offered the Army three options and left the choice between them to the discretion of the Army. As is shown by the fact that the Commission did not direct the Army to appoint Mr. Homan, he did not have a vested right to be appointed to the position in question. The Army's ultimate determination to appoint him to that position does not alter the fact that it nonetheless retained discretion with regard to making the appointment. Since that discretion was not exercised until Mr. Homan was in fact appointed on January 4, 1978, there is no basis to retroactively effect his appointment and award him backpay.

Accordingly, the Claims Division's disallowance of Mr. Homan's claim is sustained.

Milton J. Aowla

For the Comptroller General
of the United States