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PLM-1
Mr. Pool

DECISION

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

FILE: B-195357

DATE: January 24, 1980

MATTER OF: Daniel M. Hamers - Backpay

DIGEST:

1. Employee accepted reduction in grade in lieu of reduction-in-force. Record discloses that downgrading was result of reorganization and that agency regulations required downgrading to be processed as if it were reduction-in-force. Agency's failure to substantially comply with nondiscretionary requirement to consider him in filling vacancies at time of reduction-in-force and for 2 years thereafter was substantial procedural defect which rendered downgrading action void and constituted unjustified or unwarranted personnel action remediable pursuant to 5 U.S.C. § 5596 (1976).

2. Employee who alleges improper demotion and failure of agency to accord him proper priority consideration in filling positions at his former grade was advised to utilize agency's grievance system. Agency appointed grievance examiner who made findings and recommendations favoring grievant which were accepted by deciding official consistent with agency's regulations. Agency now asserts issues were nongrievable and neither official was "appropriate authority" under 5 U.S.C. § 5596. We disagree, but in any event to prevent inequitable result we have reviewed claim as "appropriate authority" under 5 C.F.R. § 550.803(d)(2).

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[GRIEVANCE INVOLVING RESTORATION TO FORMER POSITION] ~~008412~~

3. Agency contends that compliance with regulation which provides that employees downgraded due to reorganization will be accorded procedural rights as if demotion were reduction-in-force was not mandatory because downgrading action was voluntary. Employee's acceptance of downgrading was not voluntary. Agency regulation provides in part that change to lower graded position is voluntary if employee fully understands consequences of action. Since employee was told he would receive certain rights afforded under reduction-in-force procedures and that information was inaccurate, employee could not have fully understood consequences of downgrading.

ISSUE

The issue presented in this case is whether the Department of Energy (DOE) may, pursuant to a grievance examiner's award, properly restore an employee to his former position with backpay under the authority of the Back Pay Act of 1966 (5 U.S.C. § 5596 (1976)). AGC 00913

HISTORY OF CASE

The Director, Headquarters Personnel Operations Division, DOE, has petitioned this Office, pursuant to 31 U.S.C. §§74 and 82d (1976), for a review of a grievance examiner's recommended award-accepted by the deciding official - in an agency grievance filed by Mr. Daniel M. Hamers. The essential facts will only be summarized here since they are not contested and are stated in the grievance examiner's report of findings and recommendations.

AGC 00743
AGC 00066

Mr. Hamers, now a retired employee of the Department of Energy 1/ accepted a reduction in grade from GG-15 to GG-14 "in lieu of a reduction-in-force", effective August 4, 1974. He was accorded salary retention and official promise of priority consideration for repromotion during the ensuing 2-year period. The 2-year period expired in August 1976 without Mr. Hamers having been repromoted. His request for an extension of the priority consideration period was denied. On July 28, 1976, Mr. Hamers initiated the first stage of an informal grievance but the first stage meeting was cancelled. He later sent a detailed account concerning his original reduction and subsequent nonpromotion to the Director of Personnel in December 1976. For reasons not pertinent to the disposition of the issue presented a formal grievance in writing was not presented until August 1, 1978.

1/ At the time of his reduction on August 4, 1974, Mr. Hamers was a GG-15, Senior Management Analyst, Division of Personnel, at the Atomic Energy Commission (AEC). On January 19, 1975, AEC became part of the Energy Research Development Administration (ERDA), and subsequently Mr. Hamers occupied the position GG-14, Energy Specialsit, Office of Environment, ERDA. As excepted agencies, both AEC and ERDA utilized "GG" grades which were essentially equivalent to corresponding grades in the General Schedule (GS). On October 1, 1977, ERDA became part of the Department of Energy (DOE) - which did not have excepted status-and Mr. Hamers occupied a position at the GS-14 level in the Office of Environment, DOE. Mr. Hamers retired effective June 30, 1979.

The grievance examiner, Mr. Jack B. Newman, issued his report of findings and recommendations on December 18, 1978, concluding in part as follows:

> "1. The agency failed to follow its own procedures for priority consideration for re-promotion. During the 2 year period there were numerous vacancies for which the grievant qualified, but the record shows the agency submitted his qualifications for consideration only once.
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> "2. In the downgrading action, the grievant was not officially notified of an impending separation; the downgrading document fails to inform the grievant why the action is being taken; Form AEC 50 effecting the downgrading is deficient in that it makes the incorrect statement that the grievant was notified in writing that he was subject to separation; there is no record to show even minimum attempts to help a career-veteran from downgrading by observing the agency's own procedures for such action. It is the Examiner's carefully considered conclusion that the whole personnel process, i.e., the initiation of the downgrading action, and the documents connected therewith; the placement failures in the two year priority consideration period; the agency delays; apparent lack of agency interest; and apparent ineptness in the advice and assistance to the grievant; all clearly meet the definition of 'unjustified or unwarranted personnel action'."

In view of these findings and conclusions the grievance examiner made the following recommendations:

> "1. The grievant Mr. Daniel M. Hamers should be restored to a position in grade GG-15, with rank and authority equal to the Senior Management Analyst position GG-0343-15 from which he was downgraded effective August 4, 1974.

"2. The restoration of Mr. Hamers to the grade GG-15 level should include all of the provisions of the Back Pay Act of 1966, 5 U.S.C. 5596 (1970), and as is anticipated by agency regulations AEC 4170-056 April 12, 1973."

On January 20, 1979, the deciding official, Dr. James L. Liverman, Deputy Assistant Secretary for Environment, DOE, accepted the grievance examiner's recommendations and requested the agency's personnel office and controller to take action to restore Mr. Hamers to the grade GG-15 level retroactive to August 4, 1974, with full backpay under 5 U.S.C. § 5596.

The Headquarters Personnel Operations Division, DOE, has refused to implement the recommended award, notwithstanding the action of the deciding official, because it maintains "that the grievance examiner and deciding official did not possess appropriate authority as delegated by Civil Service Commission and agency regulations and that the award is contrary to Civil Service Commission regulations."

OPINION

In asking us to review the grievance award, the Director, Headquarters Personnel Operations Division, DOE, contends that the grievance examiner and the deciding official derived their authority to make a decision from the grievance procedures outlined in DOE Interim Management Directive (IMD) No. 3771, February 17, 1978, and that they exceeded their authority. Thus, the Director argues that the grievance examiner's recommended award reflected a finding that Mr. Hamers was involuntarily demoted under conditions of a reorganization which mandated the application of reduction-in-force personnel procedures, and that such matters are not grievable under the provisions of IMD No. 3771 Appendix A.

In view of salary retention and the alleged period of priority consideration for repromotion that attended Mr. Hamers' downgrading, he was not injured until August 4, 1976, when both the salary retention and the priority consideration period expired. In anticipation of this result Mr. Hamers requested an extension of the priority consideration period, in writing, July 27, 1976, and initiated informal grievance procedures on July 28, 1976. The record indicates that beginning July 28, 1976, Mr. Hamers was consistently advised and directed by agency officials to attempt to resolve his dissatisfactions through the agency's grievance process. This course of action was finally mandated in accordance with the Inspector General's statement of June 27, 1978, that formal grievance procedures should be instituted in Mr. Hamers' case. As a result on October 20, 1978, the agency - in full consideration of the substance of Mr.Hamers' allegations and claim - instituted formal grievance proceedings and appointed a grievance examiner to evaluate Mr. Hamers' claim.

As noted above, Mr. Hamers' entitlement to salary retention along with the agency's commitment to a prospective 2 year priority consideration period, prevented any actual financial injury to Mr. Hamers until those benefits expired in August 1976. Upon seeking remedial relief for the agency's failure to provide proper priority consideration, Mr. Hamers was advised and directed to employ the agency's grievance process. The operative effect of these facts was that Mr. Hamers was foreclosed as time-barred from appealing the adverse action in his case to the Civil Service Commission. However, it is apparent that Mr. Hamers' claim is essentially a composite of the two inseparable allegations, i.e. that the agency improperly demoted him under conditions of a reduction-in-force, and that the agency failed to accord him proper priority consideration. Therefore, while it is arguable that the improper reduction-in-force did not constitute a grievable matter in the circumstances presented, it appears that the agency's

failure in regard to the priority consideration process was a grievable matter under the provisions of IMD No. 3771. Thus, on the basis of the record before us, we believe that the grievance examiner and the deciding official did have the authority to render a determination on the issue of an unjustified or unwarranted personnel action as an "appropriate authority" in accordance with 5 C.F.R. § 550.803(d)(5). In any event, in order to prevent an inequitable result, this Office will review Mr. Hamers' claim as an "appropriate authority" pursuant to 5 C.F.R. § 550.803(d)(2).

The Headquarters Personnel Operations Division, DOE, believes that the grievance examiner's recommended award is inconsistent with the Back Pay Act of 1966 (5 U.S.C. § 5596) and the regulations promulgated by the Civil Service Commission pursuant to that statute. In essence the division contends that the grievance examiner's finding that Mr. Hamers should be awarded a position in grade GG-15 retroactive to August 4, 1974, is violative of the requirements of 5 C.F.R. § 550.803(a) because it cannot be determined that Mr. Hamers would have been placed in such a position "but for" the agency's failure to provide proper priority consideration during the specified 2-year period. In this regard the agency contends that a selecting official may not be required to select a particular candidate referred through priority consideration procedures. The agency concludes that the only exception is when it has been determined that the candidate would have been selected "but for" the violation of law or regulation that occurred.

We do not believe that the standard proposed by the Division applies to, or disposes of, the issues presented by Mr. Hamers' claim. It is not the agency's failure to restore Mr. Hamers to a GG-15 position that constitutes the unjustified or unwarranted personnel action in this case. Rather, it is the agency's demonstrated failure to provide

Mr. Hamers proper priority consideration in filling GG-15 vacancies - in derogation of the agency's nondiscretionary procedures - that constitutes the unjustified or unwarranted personnel action in his case. In short, the issue presented is not whether selecting officials had to select him when a vacancy arose, but whether the agency had a duty to properly consider him in filling such a vacancy.

When Mr. Hamers accepted a reduction in grade from GG-15 to GG-14 "in lieu of reduction-in-force" he was officially promised that he would be placed on the Headquarters Repromotion Priority List in the same manner as if the change to lower grade were accomplished by the reduction-in-force procedures of AEC Manual Appendix 4170. Indeed, in view of the fact that the administrative record establishes that Mr. Hamers' reduction to a lower grade position was due to a reorganization, the instructions contained at AEC Manual 4170-052a.(3) required that the demotion be processed "as if" it were a reduction-in-force. Therefore the agency should have complied with the nondiscretionary provisions contained in Immediate Action Directive (IAD) 4170-88, June 20, 1974, which revised AEC Appendix 4170, part V.A., setting forth instructions which specifically described priority consideration and placement selection procedures incident to a reduction-in-force.

We have examined the nondiscretionary procedural requirements contained in AEC Appendix 4170, part V. A(2) as amended by IAD 4170-88 and concur with the findings of the grievance examiner that agency officials failed from the outset and continuously through a 2 year period to properly comply with those mandatory regulations. In this connection the grievance examiner found no evidence that Mr. Hamers was considered for filling a vacancy at the time he was being downgraded, as was required by AEC Appendix 4170. As a result, the agency's processing of Mr. Hamers' downgrading in the circumstances presented was procedurally defective from the outset.

The entitlement to backpay is governed by 5 U.S.C. § 5596(b) which provides in pertinent part as follows:

> "(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--
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> "(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 * * *."

An "unjustified or unwarranted personnel action" is defined at 5 C.F.R. §§ 550.802(c) and (d) as follows:

> "(c) 'An unjustified or unwarranted personnel action' means an act of commission (i.e., an action taken under authority granted to an authorized official) or of omission (i.e., nonexercise of proper authority by an authorized official) which it is subsequently determined violated or improperly applied the requirements of a nondiscretionary provision, as defined herein, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay, allowances, or differential, as used here, otherwise due an employee. The words 'personnel action' include personnel actions and pay actions (alone or in combination).

> "(d)'Nondiscretionary provision" means any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria."

The criteria for determining when an unjustified or unwarranted personnel action has occurred are set forth at 5 C.F.R. § 550.803(e) which provides as follows:

> "(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."

The reference in the quoted regulation to "procedural defects" is consistent with court decisions allowing backpay where an employee has been harmed by a procedural violation by an agency. Thus, the Court of Claims in Gratehouse v. U.S., 512 F2d 1104, 1108 (1975) stated:

> "Where it is found that an adverse personnel action has been carried out in substantial violation of procedural regulation, it is a void action and the employee is entitled to recover any pay which he has been illegally deprived. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L.Ed.2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); Leone v. United States, 204 Ct.Cl. 334 (1974); Jones v. United States, 203 Ct. Cl. 554 (1974); Hanifan v. United States, 354 F.2d 358, 173 Ct.Cl. 1053 (1965). Exceptions are made to the rule where the procedural error is deemed harmless." [Footnote omitted].

In the present case Mr. Hamers' reduction to a lower grade was due to a reorganization. As previously noted, the agency's regulations required that the demotion be processed in accordance with the agency's reduction-in-force procedural provisions. Therefore, because those nondiscretionary procedural provisions were not complied with in Mr. Hamers' case, the reduction to a lower grade position was procedurally defective and constituted an unjustified or unwarranted personnel action remediable under the provisions of 5 U.S.C. § 5596.

Moreover, any effective action on Mr. Hamers' part to contest his demotion was rendered unnecessary at the time because the agency gave him salary retention and promised to accord him priority consideration for repromotion for 2 years. As documented by the grievance examiner, the agency clearly failed to carry out its promise during the 2-year period. This failure constituted a substantial procedural violation of the agency's own regulation which caused Mr. Hamers to be illegally deprived of pay. Under the civil service regulations and the court decisions quoted above, such a substantial procedural violation clearly constitutes an unjustified or unwarranted personnel action within the meaning of the Back Pay Act.

In the face of such a prejudicial violation by the agency of its own procedural requirements, we need not consider whether Mr. Hamers would have been selected for one of the openings during the 2-year period. The agency's action has made it impossible to determine whether he would have been selected and it cannot now be heard to raise this defense. We fully agree that if Mr. Hamers had been given priority consideration for all or most of the openings but had not been selected he could not be heard to complain. But that is not this case. We further note that in such a case Mr. Hamers could have grieved his failure to be selected for a particular vacancy.

The Headquarters Personnel Operations Division, DOE, also takes exception to the grievance examiner's finding that the agency failed to follow proper reduction-in-force procedures in effecting Mr. Hamers' downgrading. The Director's submission contends that the application of reduction-in-force procedural requirements were not mandatory in Mr. Hamers' case because the downgrading was a voluntary act on the part of the employee.

We do not agree that Mr. Hamers' downgrading was "voluntary" within the meaning of the agency's regulations applicable at the time of the personnel action. AEC Appendix 4108, part VI, paragraph E.3, provides that a change to a lower graded position is voluntary if the employee has in fact voluntarily, without pressure or coercion, requested the action, fully understands the consequences, and regards the transaction to be for his own benefit; and if management and supervisors have not requested or required the action. The administrative record indicates that Mr. Hamers did not receive an explanation of all the consequences of a volutary change to a lower graded position. On the contrary, the record indicates that he was told that such voluntary action would afford him all the rights to priority replacement afforded to employees downgraded under a reduction-in-force. Since that information was inaccurate, Mr. Hamers could not have fully understood the consequences of his voluntary demotion. Thus, we conclude that Mr. Hamers demotion was not voluntary.

CONCLUSION

Accordingly, Mr. Hamers is entitled to receive backpay under the authority of the Back Pay Act of 1966, as amended, 5 U.S.C. § 5596, and in accordance with the implementing regulations contained at 5 C.F.R. § 550.801, et. seq. (1978).

Milton J. Socolar

For The Comptroller General
of the United States