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DECISION



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

FILE: B-202318

DATE: September 29, 1981

MATTER OF: Jessie M. Sheppard - Claim for Backpay

DIGEST: Employee claims backpay under 5 U.S.C. § 5596 following Civil Service Commission's grant of a variance of civil service regulations to correct inequitable situation and permit her reinstatement to a position after her previous separation which had been required by the Commission due to an improper appointment. Action by Commission did not constitute a determination that employee had undergone an unwarranted or unjustified personnel action; therefore, claim is denied.

Mrs. Jessie M. Sheppard has appealed the action of our Claims Group in which a settlement issued August 29, 1980, denied her claim for backpay for the period May 22, 1976, to April 23, 1978. For the following reasons we sustain the action denying Mrs. Sheppard's claim.

The facts of this case are as follows. Mrs. Sheppard, a former employee of the Social Security Administration, had reinstatement rights through August 31, 1975. By letter dated August 29, 1975, she was offered a temporary appointment by Social Security with the date of entry on duty of September 22, 1975. The staffing specialist who processed Mrs. Sheppard's appointment erroneously believed that the job offer before August 31, 1975, preserved Mrs. Sheppard's reinstatement rights. Therefore, she did not report to work until September 22, 1975, although she was available and could have been appointed immediately. In April 1976, while attempting to convert Mrs. Sheppard's appointment from temporary to career-conditional, Social Security discovered its administrative error in hiring Mrs. Sheppard after August 31, 1975. The agency requested permission from the Baltimore Area Office of the Civil Service Commission to keep Mrs. Sheppard on duty until September 21, 1976, the expiration of her temporary appointment. The Commission denied the request and ordered that she be terminated. Mrs. Sheppard was terminated effective May 21, 1976.

Subsequently, Social Security requested that the Civil Service Commission grant a variance under section 5.1(b)

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of Civil Service Rule V, in order to allow Mrs. Sheppard to be reinstated to a career-conditional position. The request was approved on March 13, 1978, and she was reinstated effective April 24, 1978. On April 16, 1979, Mrs. Sheppard requested an explanation of why she did not receive credit for within-grade increases, leave, and backpay during the time between her termination and reinstatement. By letter of May 9, 1979, Mrs. Sheppard was informed that she was reinstated because the Civil Service Commission had granted a waiver of Civil Service rules in her case and that she had no vested right to her position at the time of her appointment on September 22, 1975, as she was serving under a temporary appointment. Subsequently, Mrs. Sheppard filed a claim for backpay with the General Accounting Office which was disallowed in the settlement of August 29, 1980.

In appealing the disallowance of her claim, Mrs. Sheppard contends that she is entitled to backpay under the Back Pay Act, 5 U.S.C. § 5596, from the time of her separation in May 1976, until her restoration in April 1978. The Back Pay Act provides for restoration of pay and allowances for the purpose of making an employee financially whole when an employee is found to have undergone an unjustified or unwarranted personnel action. Mrs. Sheppard believes that the Commission's granting of a variance of the Civil Service rule on her behalf constituted a determination that she had undergone an unjustified personnel action, since the Commission stated that failure to approve the variance would be inequitable. Mrs. Sheppard states that the word "inequitable" as used by the Commission is compatible in meaning with "unjustified" as used in the Back Pay Act.

Although the words "inequitable" and "unjustified" may be similar in meaning, the Commission's granting of a variance to Civil Service rules to relieve an inequitable situation does not constitute a determination that the person in whose behalf the variance was granted underwent an unjustified or unwarranted personnel action. An "unjustified or unwarranted personnel action" is defined at 5 C.F.R. 550.802(c) and (d) as follows:

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"(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."

While it is clear that an administrative error occurred in Mrs. Sheppard's case, it did not result from the violation or improper application of a "nondiscretionary provision" as defined above. If an unwarranted or unjustified personnel action had occurred, the determination of its occurrence would have been sufficient to correct the wrong and at the same time have triggered the make whole remedies provided by the Back Pay Act. In Mrs. Sheppard's case in order to correct the inequitable situation it was necessary for the Commission to waive Civil Service regulations, not to direct their correct application.

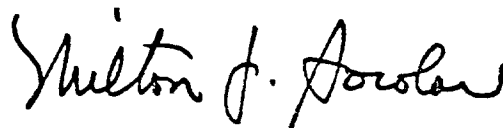
In short, the action which caused a reduction in Mrs. Sheppard's pay was her removal on May 21, 1976. This action was ordered by the Civil Service Commission and has at no time been determined to be erroneous.

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Mrs. Sheppard was removed from her position because she should not have been appointed in the first place. The administrative error which occurred was Mrs. Sheppard's appointment on September 22, 1975, and this action resulted in her receiving pay instead of taking it away from her. By separate action she was again employed under a special exemption to rules otherwise applicable. In these circumstances Mrs. Sheppard has not undergone an unwarranted or unjustified personnel action.

Accordingly, the Settlement denying her claim for backpay is sustained.

Acting



Comptroller General
of the United States