

DECISION

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

*PLM-1
Botsford
120361*

FILE: B-206445

DATE: December 6, 1982

MATTER OF: George W. Edwards - Claim for Backpay

DIGEST: An individual who alleged violation of his reemployment priority rights in connection with the filling of one position, and who accepted another position pursuant to a settlement agreement with the agency, which was adopted by the Merit System Protection Board as its decision on the matter, is not entitled to backpay. He did not have a vested right to employment by virtue of statute or regulation, nor did MSPB mandate his appointment by the agency concerned or grant backpay.

This decision is in response to an appeal by Mr. George W. Edwards from Settlement Certificate 2-2834382, dated December 15, 1981, by which our Claims Group denied his claim for a retroactive appointment with backpay and accrued leave. Mr. Edwards was separated from the Department of Housing and Urban Development (HUD) on August 12, 1978, during a reduction-in-force. On August 7, 1981, he accepted another position in settlement of his claim that his reemployment priority list rights had been violated in connection with another appointment made by HUD subsequent to his separation. Mr. Edwards claims he is entitled to backpay from the date of that appointment to the date he accepted his new position. For the reasons explained below, we must affirm the determination of our Claims Group.

Mr. Edwards was separated from HUD because his position, Real Property Officer, GS-13, was abolished during a reorganization. At the time of his separation he was placed in HUD's Displaced Employee Program and informed that he had certain reemployment priority rights. On October 22, 1979, Mr. Edwards was given a temporary appointment to the position of Realty Specialist, GS-11, in the Boston Area Office. He states that he repeatedly requested a permanent position and,

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finally, in early 1981, filed a petition with the Merit Systems Protection Board (MSPB).

On April 9, 1981, an investigator from the Office of the Special Counsel (OSC) reviewed the personnel records at the Boston office of HUD and determined that HUD had failed to accord Mr. Edwards his reemployment priority rights when it hired someone else for the position of Chief, Property Disposition Branch, GS-13, on July 29, 1979, thus violating 5 C.F.R. § 330.201. By a petition dated June 29, 1981, Mr. Edwards filed an appeal with the MSPB, and as the result of discussions between HUD and OSC, Mr. Edwards was offered, and on August 7, 1981, accepted HUD's offer to appoint him to the position of Supervisory Realty Specialist (Deputy Chief of the Property Disposition Branch) GS-12, Boston Area Office. At the time he accepted that position, Mr. Edwards signed a Settlement Agreement which provided as follows:

"In order to avoid the expense and burden of time involved in further pursuit of the above-captioned claim, George Edwards (hereinafter called the 'employee') and the United States Department of Housing and Urban Development (hereinafter called 'HUD' or 'the Department') hereby agree to the following settlement of the above-captioned claim:

"1. The Department has offered and the employee has accepted appointment to the position of Supervisory Realty Specialist (Deputy Chief of Property Disposition Branch), Boston Area Office, GS-1170-12/10 at an annual salary of \$35,033. The employee understands that he accepts this position subject to the Office of Personal Management requirement that he serve a one year probationary period and he agrees to sign the

written acknowledgment to that effect required of all HUD employees entering new supervisory and/or management positions.

"2. The employee agrees to withdraw all claims that his reemployment priority rights have been violated by the appointment of [omitted] and agree to withdraw his request before the Merit Systems Protection Board, Boston Regional Office, Case No. BN03308110157.

"3. The employee agrees to accept this position in full settlement of any claimed violation of his reemployment rights by the appointment of [omitted] and hereby waives all rights to appeal the specific matter of violation of his rights by that appointment.

"4. The employee agrees and understands that he will not receive any type of priority consideration for a higher grade position but will receive appropriate consideration for such a position.

"5. The Department in no way concedes that the employee was entitled to appointment to the position of Chief, Property Disposition Branch, Boston Area Office in July of 1979.

"The foregoing agreement constitutes the entire agreement between the parties to the above-captioned claim."

Mr. Edwards submitted a copy of the agreement to the MSPB on August 10, 1981, stating that prior to signing it, he had been assured by HUD officials that although he was giving up any claim to the position of Chief of Property Disposition, he was not waiving his right to pursue a claim for backpay and other allowances. He requested the MSPB, if it determined his right to pursue a claim for backpay had not been abrogated, to consider his claim to be withdrawn. The MSPB

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afforded HUD an opportunity to respond and HUD affirmed that the settlement was not to be construed to prevent Mr. Edward from pursuing a claim for backpay. Rather than considering his claim to be withdrawn however, the MSPB approved the settlement and accepted it, in lieu of adjudication, as its own decision on October 28, 1981.

Prior to that date, on August 24, 1981, Mr. Edwards sent his claim for backpay to our Claims Group. Our Claims Group denied his claim on December 15, 1981, because there was no evidence that he had a vested right to the position and because MSPB had not ordered a retroactive appointment. Mr. Edwards appealed that determination by a letter dated December 29, 1981, which he sent to the Comptroller General and to MSPB, OPM, and OSC. The MSPB construed Mr. Edward's letter as a petition for enforcement of the settlement agreement and, therefore, examined whether HUD had violated that agreement. In its decision dated March 19, 1982, MSPB determined that no violation of that agreement had occurred. With specific reference to the issue of backpay, MSPB stated that from the evidence it was clear that HUD and Mr. Edwards had agreed only that his right to make a claim for backpay would not be abrogated by the settlement agreement, and that HUD had not misled or interfered with Mr. Edward's pursuit of that claim.

The authority of this Office to award backpay derives from the Back Pay Act, 5 U.S.C. § 5596 (1976), which 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. Under the Back Pay Act, we have held that 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 a statute or regulation. Our Office has permitted such a remedy in situations where an agency violated a statutory right of reemployment, violated a mandatory policy in effecting

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appointments without a break in service following retirement, or improperly restrained an employee from entering upon the performance of his duties. See 54 Comp. Gen. 1028 (1975); B-175373, April 21, 1972; and B-158925, July 16, 1968.

The situation where an employee's reemployment priority list rights are violated does not normally fall into the category of the cases mentioned above. In connection with OPM's direction that each agency is required to operate a positive placement program for its displaced employees, 5 C.F.R. § 330.302(b) (1982), requires that, at a minimum, each program must provide for the establishment and maintenance of a reemployment priority list for the commuting area. The OPM's directions concerning the operation of the list are outlined in 5 C.F.R. § 330.201. Placement on the reemployment priority list does not give the displaced employee a vested right to any particular position but, rather, grants him the right to be considered for a position.

Nor does the remedy provided by the Office of Personnel Management for violation of an employee's reemployment priority provide him with a vested right to any position. The Federal Personnel Manual, Chapter 330, Subchapter 2-3, provides that:

"When on review the Commission [now OPM] finds an agency has filled a position contrary to the restrictions of this subchapter, it will require corrective action. The agency may correct the improper employment by separating the employee improperly employed, after which it may fill the position by any means not restricted by the reemployment priority list. The agency also may correct the improper employment without separating the employee improperly employed by appointing from the list all individuals whose reemployment priority was violated by the improper employment."

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Pursuant to these corrective measures the agency retains discretion to appoint and, therefore, there is no basis for us to make a determination that the employee should be appointed retroactively and receive backpay. See David R. Homan, 59 Comp. Gen. 62 (1979).

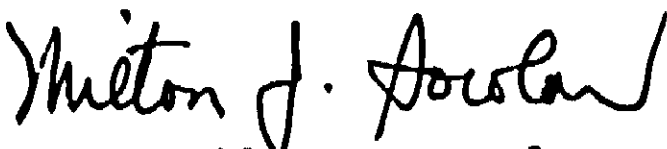
The effect of these precepts is illustrated by James L. Hancox, B-197884, July 15, 1980. In that case we held that an individual appointed by the Air Force after a determination by the MSPB that his reemployment rights had been violated was not entitled to backpay for the period prior to his actual employment. Although the MSPB found a violation of his reemployment priority rights had occurred, it referred the matter to the agency for corrective action according to Federal Personnel Manual Chapter 300, Subchapter 2-8. As a result, we held that the claimant was not entitled to backpay because he did not have a vested right to employment and the agency retained discretion with respect to filling the position.

We note also that the MSPB is an appropriate authority under the Back Pay Act to determine that an unwarranted or unjustified personnel action justifying backpay has occurred. See Anthony F. Librande, B-206617, May 18, 1982. However, it failed to grant backpay and instead it adopted, as its final decision, a settlement agreement by which Mr. Edwards accepted the GS-12 Deputy Chief position in full settlement of his claim concerning the violation of his reemployment priority rights.

In summary, Mr. Edwards is not entitled to backpay because he had no vested right to the GS-13 position. The regulations governing the correction of a violation of reemployment priority rights do not require that an agency retroactively reinstate an individual into the position filled in violation of his rights and, in this case, MSPB did not order such action on the part of

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HUD. Our Claims Group's determination is hereby affirmed.

for 
Comptroller General
of the United States