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

FILE: B-212085 **DATE:** December 6, 1983

MATTER OF: Irene Sengstack - Retroactive Step Adjustment and Backpay

DIGEST:

1. Employee, who was serving in a temporary position following a reduction-in-force, was released by the agency when her temporary appointment expired. Employee was later reemployed by agency following a service break, in a grade previously held, but at step 1 of grade. Employee claims entitlement to retroactive step adjustment and backpay to step 9, the highest step of grade previously held. Use of highest previous rate is discretionary on agency's part, there being no employee-vested interest in that higher step upon reemployment in absence of regulation so providing. In view of existing agency policy that highest previous rate would only apply to reappointments without a service break, agency action was proper.

2. Employee, whose temporary position expired, charges improper break in service caused her to lose the benefit of the highest previous rate rule when she was later reemployed at only step 1 of her prior grade. Our Office has no jurisdiction to consider her allegations that she was improperly denied appointment to another position or that her reemployment rights were violated. Such matters may be appealed to her employing agency or the Merit Systems Protection Board.

This decision is in response to correspondence from Joseph Meehan, Esquire, on behalf of Ms. Irene F. Sengstack, an employee of the Department of the Army, requesting further consideration of her claim for backpay under the highest previous rate rule incident to her appointment to a position in January 1977.

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Ms. Sengstack's claim was the subject of a disallowance by our Claims Group, dated September 3, 1982, Z-2815222. The basis for that disallowance was that agency use of the highest previous rate rule is discretionary and, under existing agency rules, its use is only applicable in cases where the employee has no break in service. Since there was a break in Ms. Sengstack's service, the highest previous rate rule may not be applied.

The basis for Ms. Sengstack's appeal is her assertion that the break in service was improper. She contends that prior to her release from a temporary appointment in a grade GS-4 position in March 1976, a grade GS-3 Clerk-Typist position became available to her and that she accepted that position. She also contends that following her acceptance, she made numerous attempts to be placed in that position, but was improperly denied the opportunity to be so assigned. Further, she states that the position was subsequently given to someone else in violation of her Reemployment Priority rights. Finally, Ms. Sengstack argues that had that violation not occurred, she would have been placed in that position, she would not have had a break in service, and she would have been entitled to higher pay under the highest previous rate rule.

We sustain the disallowance by our Claims Group for the following reasons.

In 1971, Ms. Sengstack underwent a reduction-in-force from her permanent position of Card Punch Operator at the United States Army Support Activity, Edison, New Jersey. She was offered and accepted a temporary appointment, effective May 21, 1971, and thereafter, she received several additional temporary appointments to positions with the Department of the Army, the last of which was scheduled to and did expire on March 8, 1976.

In February 1976, a permanent grade GS-3 Clerk-Typist position became available, and Ms. Sengstack states that she accepted that appointment and took affirmative steps to be assigned to that position. In support of that assertion, she has provided a copy of a brief letter addressed to the Civilian Personnel Officer of her employing activity, dated March 3, 1976, regarding her willingness to be so assigned. Ms. Sengstack also states that she submitted a completed

Standard Form 171 for that position. On March 8, 1976, having heard nothing further regarding her application, Ms. Sengstack was released from Federal employment since her temporary appointment had expired.

Ms. Sengstack appealed the termination of her temporary appointment to the Federal Employee Appeals Authority (FEAA), Civil Service Commission. The FEAA, by letter dated April 9, 1976, denied her appeal stating they had no jurisdiction to consider terminations of temporary appointments. The FEAA also noted that Mr. Sengstack had declined appointment to the Clerk-Typist, grade GS-3 position.

On January 24, 1977, she was selected for the permanent, full-time position of Work Order Clerk, Grade GS-4, and her salary was set at step 1 of that grade. Thereafter, she sought additional pay based on the highest previous rate rule since, based on prior service, she had satisfactorily performed in step 9 of that grade while serving in temporary positions.

By letter dated August 24, 1981, the Civilian Personnel Officer of her employing activity informed Ms. Sengstack, through counsel, that she had been offered a permanent, full-time Clerk-Typist grade GS-3 position prior to termination of her temporary appointment on March 8, 1976, but that she had failed to timely respond to the employment offer. Such failure to respond was considered a declination of the offer by her. The agency report further stated that under the Reemployment Priority Program procedures contained in Federal Personnel Manual, Chapter 351, an agency may delete an employee's name from the priority listing when the employee declines to accept a permanent, full-time competitive position. The agency report concluded that since she had lost her Reemployment Priority listing, she was ineligible to use the highest previous rate rule for salary setting purposes when she was reemployed in January 1977.

Ms. Sengstack filed an appeal with the Merit Systems Protection Board (MSPB). However, the issue presented by her for their adjudication was the propriety of the agency determination of August 24, 1981, denying her claim for a higher step designation and backpay when she was reemployed

in 1977. The MSPB ruled against Ms. Sengstack on jurisdictional grounds stating that questions of backpay entitlement are not within their jurisdiction to resolve. MSPB No. NY 34438210156, March 15, 1982. The Board decision went on to point out that had her appeal been on the basis that her agency incorrectly applied the regulations governing reduction-in-force actions and reemployment priority rights thereunder, a valid jurisdictional basis would have existed for their consideration of the matter. However, since her appeal related only to the propriety of her step designation upon reemployment in 1977, the Board had no jurisdiction under 5 C.F.R. § 351.901 (1979), stating that only this Office (General Accounting Office), could resolve a backpay dispute of this type between the agency and the claimant.

We consider that ruling correct. The authority of this Office to award backpay on such questions arises from the Back Pay Act, 5 U.S.C. § 5596 (1976), which provides a remedy for instances when an employee is found to have undergone an unwarranted or unjustified personnel action which has resulted in the withdrawal or reduction of all or part of their pay, allowances or differentials. We have held that instances in which appointments may be effected retroactively and backpay awarded are restricted to those situations in which an individual has a vested right to an employment status at the time of appointment by virtue of a statute or regulation. Thus, we have permitted such a remedy in situations where an agency is found to have violated a statutory right of reemployment, violated a mandatory policy in effecting appointments without a break in service following retirement, or improperly prevented an employee from entering upon the performance of his duties. See 54 Comp. Gen. 1028 (1975); and B-175373, April 21, 1972.

With regard to reemployment priority list rights, we note that under Part 330 of title 5, Code of Federal Regulations (1976), each agency is required to operate a positive placement program for its displaced employees. Subsection 330.302 requires that, at a minimum, each program must provide for the establishment and maintenance of a reemployment priority list for the commuting area, with the operation of that list outlined in 5 C.F.R. § 330.201. We also note that placement on the Reemployment Priority List does not give the displaced employee a vested right to any

particular position; it only grants the employee the right to be considered for a position. In this regard, 5 C.F.R. § 330.202, provided at the time in question that if an employee believed his or her reemployment priority rights were violated, that employee could appeal that action to the Civil Service Commission.

Thus, the issue of the propriety of removing Ms. Sengstack's name from the Reemployment Priority List following her discharge from her temporary appointment on March 8, 1976, and the issue as to whether she declined a permanent full-time position prior to March 8, 1976, thereby causing her removal from that list, were never adjudicated by Civil Service Commission or the MSPB.

Our Office has no jurisdiction to consider such questions as the propriety of removing Ms. Sengstack from the Reemployment Priority List, whether she declined the position offered prior to the termination of her temporary appointment, or whether her reemployment rights were violated. Such matters are appealable to the employing agency or the MSPB. We note that Ms. Sengstack has filed two unsuccessful appeals before the MSPB and its predecessor agency.

In view thereof, the only question which we may consider is whether, under the provisions of 5 U.S.C. § 5596(b)(1), the agency action in January 1977, placing Ms. Sengstack in step 1 of her reemployment grade, rather than step 9, constituted an improper or unwarranted personnel action. It is our position that it did not.

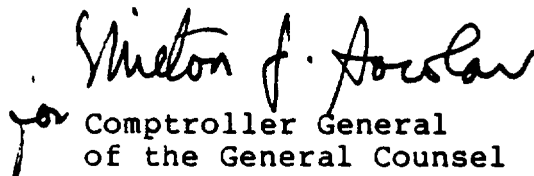
Ms. Sengstack was released from her temporary appointment March 8, 1976. She received a permanent, full-time competitive appointment on January 24, 1977, as a Work Order Clerk, grade GS-4, and had her salary set at step 1 of that grade. She had no Federal employment from March 8, 1976, to January 24, 1977.

The statutory authority for use of the highest previous rate rule is contained in 5 U.S.C. § 5334(a) and 5 C.F.R. § 531.203(c). These provisions authorize, generally, that the salary to be paid an employee who is reemployed may be established at any rate of the employee's grade which does

not exceed the employee's highest previous rate of pay. Agency authority to use the highest previous rate rule is not mandatory, and an agency may fix an employee's salary on reemployment at the minimum step of his new grade. The fact that an employee may have served in a higher step of that grade sometime in the past does not provide the employee with a vested interest in that higher step on reemployment, in the absence of agency regulations so providing. Richard L. Cepela, B-184280, February 17, 1977.

Pursuant to Department of the Army Civilian Personnel Regulations, which instructed each of their activities to develop its own policy regarding the application of the highest previous rate rule, the Indiantown Gap activity established, effective October 12, 1971, that the highest previous rate rule would not be utilized in setting the salary of a former Federal employee upon reemployment. Only an employee whose reappointment was without a break in service would be eligible to have his pay fixed at the higher rate under the highest previous rate rule. Apparently, that activity policy was in effect in March 1976, when Ms. Sengstack was released from her temporary assignment, and in January 1977, when she was appointed to a competitive permanent full-time position.

Accordingly, since Ms. Sengstack had a break in service which precluded use of the highest previous rate rule, we sustain our Claims Group's disallowance of her claim for backpay.



Comptroller General
of the General Counsel