

LOWEY MARKER
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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Thomas J. Rudolph - Backpay - Delayed Appointment

File: B-219859

Date: September 19, 1986

DIGEST

Claimant resigned his position with one agency and applied for an appointment with a different agency doing the same type of job. His application was rejected based on a determination of unsuitability following an Office of Personnel Management investigation. This negative determination was ultimately reversed by the Merit Systems Protection Board and claimant was then appointed to the position. Claimant now seeks backpay and benefits under 5 U.S.C. § 5596, for the period of the delay caused by the improper suitability determination. Claim for backpay is denied. Since the claimant was not a federal employee at the time of his application and had no vested right to employment, he was not eligible for backpay under 5 U.S.C. § 5596.

DECISION

This action is in response to a letter from the counsel for Mr. Thomas J. Rudolph seeking a decision on the issue of Mr. Rudolph's right to backpay following a favorable resolution of his appeal before the Merit Systems Protection Board (MSPB). Mr. Rudolph had appealed an Office of Personnel Management (OPM) unsuitability determination which had prevented him from being appointed to the position he now holds as an air traffic controller with the Department of the Navy. Mr. Rudolph is not entitled to backpay.

BACKGROUND

Mr. Rudolph was an air traffic controller with the Federal Aviation Administration (FAA) prior to the 1981 strike. He resigned from his position with FAA effective August 27, 1981, after receiving notice of his proposed removal for unauthorized absence and participation in the strike against the FAA. On August 24, 1981, he applied for a position with the Department of the Navy as an air traffic controller at the Pacific Missile Test Center, Point Mugu, California, where he had worked from August 1977 to November 1980.

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By letter dated June 14, 1982, OPM notified Mr. Rudolph that his application for employment had been forwarded to it for a suitability determination under 5 C.F.R. Part 731. This was required by the terms of Federal Personnel Manual Bulletin 731-6, January 6, 1982, which contained a copy of a letter from President Reagan of December 9, 1981, setting forth the conditions under which air traffic controllers who had been separated for participating in the 1981 strike could be rehired by Federal agencies other than FAA.

By letter of August 17, 1982, Mr. Rudolph was advised by OPM that his employment at Point Mugu would not promote the efficiency of the service because of the close working relationship required of Point Mugu controllers with FAA controllers. He was, therefore, rated ineligible under the provisions of 5 C.F.R. § 731.202(b)(8). Mr. Rudolph appealed this determination to the MSPB.

In the MSPB's Initial Decision of April 29, 1983, the Presiding Official held that the OPM unsuitability determination was improper and ordered OPM to amend its records to reflect that Mr. Rudolph was suitable for employment at Point Mugu. An appeal to the full MSPB was filed by OPM, and was denied on November 23, 1984. After OPM amended its records, Mr. Rudolph was appointed to a position as an air traffic controller at Point Mugu, effective January 21, 1985.

By letter of March 28, 1985, counsel for Mr. Rudolph inquired as to the OPM position on backpay for Mr. Rudolph. By letter of April 9, 1985, OPM took the position that Mr. Rudolph was not entitled to backpay because he was an applicant for employment rather than an employee when the suitability determination was made.

On May 7, 1985, Mr. Rudolph filed another appeal with MSPB, contending that OPM had not complied with the earlier MSPB decision. In an Initial Decision of the MSPB Boston Regional Office, dated July 11, 1985, the MSPB held that OPM had complied with the original decision when it found that Mr. Rudolph was suitable for employment and that the question of backpay should be presented to the Comptroller General.

DISCUSSION

Counsel for Mr. Rudolph argues that Mr. Rudolph was a "reinstatement eligible," and as such he was exempt

from a suitability determination under 5 C.F.R. § 731.301(a)(1)(vi), and is an employee as defined by 5 C.F.R. § 550.803, for purposes of the Back Pay Act. Counsel also argues that "but for" the requirement imposed for a suitability investigation, Mr. Rudolph would have been hired within days of his separation from the FAA, and counsel offers to present testimony from officials at Point Mugu in support of his argument.

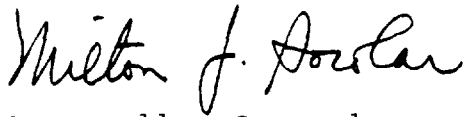
We do not agree with the above contentions by counsel. First, 5 C.F.R. § 731.301(a)(1)(vi) applies to transfers, and a transfer is defined by Federal Personnel Manual Book 315, Subchapter 5-1 as the movement from one agency to another without a break in service of one full workday. Nowhere in the record does it indicate that Mr. Rudolph was trying to transfer to Point Mugu from the FAA. In fact, he resigned his position with the FAA only 3 days after he applied for a position at Point Mugu. The fact that he had reinstatement eligibility does not render his movement to Point Mugu by resignation-application a transfer. Thus, Mr. Rudolph must be treated as an applicant for employment, not as an employee for purposes of the Back Pay Act, 5 U.S.C. § 5596.

The Back Pay Act generally applies only to federal employees. As noted above, Mr. Rudolph was not a federal employee at the time he applied for the Point Mugu position. An applicant may qualify for backpay where he has a vested right to employment by virtue of statute or regulation. Michael Kovalovsky, 60 Comp. Gen. 442, 444 (1981). As an example of such a case, the refusal of an agency to re-employ a military reservist would be a violation of a statutory right to re-employment, and would give rise to an entitlement to backpay. B-158925, July 16, 1968. The failure to follow a mandatory regulation requiring that retirement and reappointment be included in the same action to preclude a break in service was held to infringe on a vested right and backpay was allowed. 54 Comp. Gen. 1028 (1975).

There is nothing in the record before us that shows that Mr. Rudolph had any statutory right to employment at Point Mugu. We find no basis for saying that Mr. Rudolph should be treated as anything other than an applicant for employment. As such, he has no rights under the Back Pay Act, 5 U.S.C. § 5596. The Claims Court recently dismissed

a complaint seeking backpay for a period commencing prior to Federal employment. The court held that a claimant must qualify as an "employee" to be covered by the Back Pay Act. Lambert v. United States, 4 Cl. Ct. 303 (1984).

Accordingly, we find that Mr. Rudolph is not entitled to receive the backpay requested. His only remedy was that which has already been granted by the reversal of the determination of unsuitability and his subsequent appointment to the position for which he applied.

for 
Comptroller General
of the United States