The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Robert G. Joyce - Reconsideration - Severance Pay Computation
File: B-223184

Date: March 23, 1988

DIGEST

Upon voluntary separation from a permanent GS-13 position, employee was appointed without a break in service to a temporary GM-14 position with another agency. We affirm our prior decision holding that severance pay must be computed based upon the pay rate in effect at the time of employee's separation from last permanent appointment as required by 5 C.F.R. § 550.704(b)(4)(ii). This unambiguous regulatory provision is a valid exercise of administrative discretion by the Office of Personnel Management, the agency designated to issue regulations governing severance pay.

DECISION

Upon reconsideration, we affirm our holding that the Office of Personnel Management (OPM) regulation at 5 C.F.R. § 550.704(b)(4)(ii) represents a valid exercise of administrative discretion by the agency designated to issue regulations governing the payment of severance pay.

BACKGROUND

Robert G. Joyce requests reconsideration of our decision B-223184, December 19, 1986, 66 Comp. Gen. ___, in which we concluded that the amount of severance pay due him must be computed in accordance with the formula prescribed by OPM at 5 C.F.R. § 550.704(b)(4)(ii). In Mr. Joyce's situation of involuntary separation from a temporary appointment, this formula requires that severance pay under 5 U.S.C. § 5595(c)(1982) be based upon the employee's pay rate in effect at the time of his separation from his last permanent appointment, not the rate in effect at the time of separation from the temporary appointment.

The essential facts are set forth in our prior decision and are not disputed. In summary, Mr. Joyce

was employed by OPM as a program analyst at the GS-13, step 4, level. On March 21, 1982, his position was downgraded to the GS-7 level, but Mr. Joyce was entitled to retain the grade of GS-13 for 2 years. On April 16, 1983, before that 2-year period expired, he resigned from OPM to accept a temporary appointment with the Department of Housing and Urban Development (HUD) at the GM-14 level. Finally, on February 28, 1986, he was involuntarily separated from that position because of budget cuts at HUD.

Initially, HUD determined that Mr. Joyce was entitled to severance pay based upon his $47,392 rate of pay in effect at the time he was involuntarily separated from the temporary appointment. However, OPM advised HUD that, although Mr. Joyce was entitled to severance pay as a result of his separation from his temporary appointment with HUD, the computation of Mr. Joyce's severance pay must be based upon the $38,422 rate of pay he was receiving when he resigned his permanent position at OPM.

We were asked by HUD to render an advance decision because HUD questioned the OPM determination. In our decision of December 19, 1986, we upheld OPM's determination based on the clear language of 5 C.F.R. § 550.704(b)(4)(ii) (1986).

In his request for reconsideration, Mr. Joyce contends that OPM's position has no support or foundation in the severance pay statute. Essentially, his position is that the amount of severance pay must be based upon the pay rate in effect at the time when he became entitled to receive severance pay, namely February 28, 1986. At that time he was being paid $47,392 by HUD, immediately before his separation. In other words, he challenges the application of 5 C.F.R. § 550.704(b)(4)(ii) to the circumstances of his severance pay claim. He maintains that OPM has impermissibly departed from the statutory intent of 5 U.S.C. § 5595(a)(2)(ii), the legislative history of which, according to Mr. Joyce, provides no evidence "that Congress intended severance pay to be based on any pay level except the rate of base pay, including any premium pay received regularly, which the entitled employee was receiving upon being involuntarily separated."

OPINION

We have carefully considered Mr. Joyce's views, but have concluded that our prior determination in this matter must be sustained. Since Mr. Joyce continued to be covered by the severance pay provisions of 5 U.S.C. § 5595(a)(2)(ii)

when he received the full-time temporary appointment within 3 days from the termination of his permanent employment, the time for determining his entitlement to severance pay was at the termination of his temporary appointment. Donald E. Clark, 56 Comp. Gen. 750, 753 (1977). However, with respect to the computation of severance pay, OPM's regulation at 5 C.F.R. § 550.704(b)(4)(ii) clearly applies and requires that the computation of severance pay be based upon the rate received immediately before the termination of the permanent appointment. The regulation is facially clear and controls Mr. Joyce's severance computation entitlement. Since it was issued by OPM pursuant to a statutory delegation of authority, this Office will not challenge the regulation in the absence of compelling evidence that it is arbitrary, capricious, or contrary to law. See, e.g., Quern v. Mandley, 436 U.S. 725, 738 (1978).

Once eligibility to receive severance pay has been found, as it has in this case, the amount of severance pay due must be computed in accordance with the formula prescribed at 5 U.S.C. § 5595(c). The statutory formula is that severance pay is based on the pay rate "received immediately before separation . . . ." For an employee, such as Mr. Joyce, who is separated from a temporary position following a permanent appointment and retains entitlement to severance pay under section 5595(a)(2)(ii) of title 5, the term "basic pay at the rate received immediately before separation" under section 5595(c) means the "basic rate received immediately before the termination of the appointment without time limitation." 5 C.F.R. § 550.704(b)(4)(ii).

We find this regulatory provision represents a valid exercise of administrative discretion by the agency designated to prescribe regulations for the payment of severance pay. It is true that OPM could have framed the regulation differently, but we do not find that it is arbitrary, capricious or contrary to the statute. As we pointed out in our prior decision, the regulation as written protects the employee who accepts a lower-paid temporary appointment following a permanent appointment. This would be the more likely sequence, especially in a reduction-in-force situation. The fact that Mr. Joyce was able to obtain a higher paying temporary job does not entitle him to greater severance pay.

Finally, Mr. Joyce argues that Sullivan v. United States, 4 Cl. Ct. 70 (1983), aff'd, 742 F.2d 628 (Fed. Cir. 1984), supports his position. Although the Sullivan decision

is the basis upon which Mr. Joyce is entitled to receive severance pay, Sullivan does not address the issue of the computation of severance pay and does not purport to interpret or restrict the plain language of 5 C.F.R. § 550.704(b)(4)(ii).

Accordingly, we affirm our decision herein of December 19, 1986, denying Mr. Joyce's claim for additional severance pay.

for Comptroller General
of the United States