

Kirkpatrick - PLM



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Charles D. Goldman - Severance Pay - Resignation

File: B-226115

Date: July 31, 1987

DIGEST

Employee was directed by his agency head to resign as soon as possible because the employing agency no longer wanted him in excepted position. He submitted his "pro forma" resignation the next day. We find he was actually involuntarily dismissed, his separation being a resignation in form only. Since he was involuntarily separated, not by removal for cause on charges of misconduct, delinquency, or inefficiency, he is entitled to severance pay.

DECISION

This decision involves severance pay claimed by Mr. Charles D. Goldman, formerly General Counsel of the Architectural and Transportation Barriers Compliance Board, an independent Federal agency. Our Claims Group denied the claim (Z-2862545-089, September 18, 1986). It considered Mr. Goldman's separation from the Board to be a voluntary resignation, not an involuntary separation.

Upon review, we allow the claim on the basis that Mr. Goldman's separation was a resignation in form only and was in fact an involuntary separation from the service.

Section 5595 of title 5, United States Code (1982), governs entitlement to severance pay and provides in part:

"(b) Under regulations prescribed by the President or such officer or agency as he may designate, an employee who--

"(1) has been employed currently for a continuous period of at least 12 months; and

"(2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;

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is entitled to be paid severance pay in regular pay periods by the agency from which separated."

Mr. Goldman was a full-time Federal employee with over 12 months continuous service. Hence, the issue for our decision is whether or not he was "involuntarily separated" from the service within the meaning of 5 U.S.C. § 5595(b)(2), quoted above.

Under the implementing regulations, a separation by resignation is involuntary only if the employee resigns after: (1) receiving a specific notice in writing from the employing agency that the employee is to be involuntarily separated not by removal for cause on charges of misconduct, delinquency, or inefficiency; (2) receiving a general notice of a reduction-in-force; or (3) receiving a notice proposing separation for declining to accompany the employing activity when it is moved to another commuting area. 5 C.F.R. § 550.706(a) and (b) (1986).

Our Claims Group denied severance pay because Mr. Goldman was never given a written notice, specific or otherwise, that he was to be involuntarily separated from employment with the Board. Accordingly, Claims Group considered his resignation to be a voluntary separation and his claim was denied.

In requesting reconsideration of the denial, Mr. Goldman states that he was a career Federal employee whose career was abbreviated when he was forced to resign by the then Chairperson of the Architectural and Transportation Barriers Compliance Board, William Bradford Reynolds. Mr. Goldman adds that there was no indication his performance was other than satisfactory and that his resignation was a pro forma submission and not a voluntary action.

The facts before us show that Mr. Goldman served as General Counsel of the Board from 1975 until 1983. On July 10, 1983, at the Board's request, he voluntarily accepted a change to a lower grade position as a GS-14 attorney with the Board and was detailed to a Senate Committee on a fellowship.

At the end of September 1983 Mr. Goldman neared completion of his fellowship program with the Senate Committee and planned to return to his regular duties at the Board. A negative response to his return is reflected in a memorandum to him of September 29, 1983, from his supervisor, who had replaced him as General Counsel. It stated that she would

not extend his fellowship and that his request for an extension should be directed to either Mr. Reynolds or another Board official. The memorandum related an earlier discussion when she had informed Mr. Goldman that if he did not receive an extension he would be "considered AWOL [absent without leave] as of October 1." The memorandum concluded:

"You asked me several times whether there would be a desk for you to report to and I stated several times in response that you should call Mr. Reynolds."

With his supervisor apparently not having a desk for him, but at the same time considering him absent without leave unless he received an extension of his Senate fellowship which she would not authorize, Mr. Goldman heeded her advice to seek counsel from Mr. Reynolds. On October 3, 1983, Mr. Goldman wrote Mr. Reynolds to confirm that when counseling him Mr. Reynolds had authorized an extension of the fellowship but only through October 31, 1983. This letter related the key point imparted to Mr. Goldman in the counseling:

"You [Mr. Reynolds] have further indicated that you do not wish me to return to the Board on my completion of the Fellowship. Accordingly, unless you advise me to the contrary in writing, I will submit a pro forma resignation from the Federal Service, effective November 1, 1983."

Thus, Mr. Goldman requested confirmation in writing if Mr. Reynolds changed his mind and did want him to return to the Board. Otherwise, Mr. Goldman said he would submit a "pro forma resignation."

In response, Mr. Reynolds as Chairperson of the Board directed Mr. Goldman by letter of October 25, 1983, to resign from employment as follows:

"* * * the Board is entering a new phase of its mission. Accordingly, it is in the best interests of the Board that you not return upon completion of the Fellowship. Kindly submit your resignation as soon as possible."

As one attorney communicating to another, Mr. Reynolds and Mr. Goldman would reasonably understand the "pro forma resignation" proposed by Mr. Goldman to mean a resignation as a matter of form only without Mr. Goldman

actually choosing to voluntarily separate and have his legal rights governed thereby.^{1/} Mr. Reynolds' letter can therefore be construed to mean a direction that Mr. Goldman submit his resignation even though for the sake of appearances-only. The surrounding circumstances discussed above show that the imperative sentence, "Kindly submit your resignation as soon as possible," was not mere entreaty or advice. It was a negative answer to Mr. Goldman's inquiries as to whether there would be a desk for him to report to upon completion of his Senate fellowship.

As Mr. Reynolds directed, Mr. Goldman on October 26, 1983, submitted his "pro forma" resignation to Mr. Reynolds: "I hereby resign from the Government, effective November 4, 1983."

Finally, we note that in his claim letters Mr. Goldman asserts that his pro forma resignation was submitted in the face of a threat that the Board would fire him if he did not resign. We note that the Board in its administrative report to us of May 24, 1985, at page 4, does not deny the threat but at least for the purpose of argument assumes such a threat.

In the particular facts of this case, the direction from the agency head to submit a resignation as soon as possible presented no alternative course for Mr. Goldman to weigh and consider. He had no choice but to leave the Board. State ex rel. Freeman v. Scheve, 93 N.W. 169, 170, 65 Neb. 853 (1903). On the following day, October 26, 1983, he submitted what in form was a resignation effective November 4, 1983, but in actuality was the final action of his involuntary dismissal.

We note that the Office of Personnel Management for general purposes defines resignation as follows:

"Resignation is a separation in response to an employee's request for the action. It is a

^{1/} See the entry "pro forma" in Black's Law Dictionary (giving as an example a pro forma judgment which is appealable and not rendered on a conviction that it was right, but rather to facilitate further proceedings); Redden and Veron, Modern Legal Glossary (a person named to a suit simply pro forma does not become a party to the action); Burton, Legal Thesaurus (pro forma has the meaning "for the sake of appearances.")

voluntary expression of the employee's desire to leave the organization and must not be demanded as an alternative to some other action to be taken or withheld. (See FPM Supplement 752-1 for a discussion of coerced resignation.) An employee may, however, elect to resign rather than face removal procedures." (Emphasis added.) Federal Personnel Manual (FPM), Chapter 715, para. 2-1.

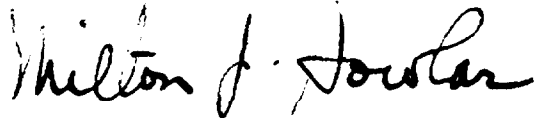
In light of the fact that Mr. Goldman was serving in an excepted service (Schedule A) attorney position and was not a preference eligible under the Veterans' Preference Act, 5 U.S.C. § 2108, he had no procedural job protection rights whatever. He served at the pleasure of the Board and could be dismissed at any time. Batchelor v. United States, 169 Ct. Cl. 180, cert. denied, 382 U.S. 870 (1965); Fiorentino v. United States, 607 F.2d 963, 221 Ct. Cl. 545 (1979), cert. denied 444 U.S. 1083 (1980); Chu v. United States, 773 F.2d 1226 (Fed. Cir. 1985). Under these circumstances, we can reach no conclusion other than that he was involuntarily separated.

As mentioned above, the Office of Personnel Management has also provided in 5 C.F.R. § 550.706 that, for entitlement to severance pay, a "resignation" is an involuntary separation only if one of the three notices listed in 5 C.F.R. § 550.706(a) is received by the employee. However, Mr. Goldman's separation was a "resignation" in form only and not one as defined by the Office of Personnel Management. We therefore believe that 5 C.F.R. § 550.706, which does not define "resignation," is inapplicable, and it is immaterial that he did not receive one of the three notices. The controlling provision in this case is the Federal Personnel Manual provision quoted above containing the Office of Personnel Management's general definition of "resignation." We may not ignore the definition and construe the regulation in a manner defeating the purpose of the statute granting severance pay to employees involuntarily separated through no fault of their own. Spring v. United States, 492 F.2d 1053 (4th Cir. 1974).

The United States Claims Court has considered "involuntary separation" for the purpose of severance pay entitlement to mean separation against the will and without the consent of the employee. Sullivan v. United States, 4 Cl. Ct. 70 (1983), aff'd, 742 F.2d 628 (Fed. Cir. 1984). This meaning is substantially the same as the FPM general definition of "resignation" used by the Office of

Personnel Management. It pertains to Mr. Goldman's separation which was involuntary, but not by removal for cause on charges of misconduct, delinquency, or inefficiency.

Mr. Goldman's claim for severance pay is, therefore, allowed.

for 
Comptroller General
of the United States