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DECISION



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

50517

FILE: **B-181614**

DATE: **FEB 5 1975**

MATTER OF:

**Charles E. King--Grievance committee recommendation
of backpay without reinstatement**

DIGEST:

1. Department of State Grievance Committee recommended that Foreign Service employee, who resigned because alleged unresolved grievances were affecting his health, be given backpay from date of resignation until resolution of grievance, without recommending his reinstatement. Recommendation may not be implemented because committee did not conclude employee had been coerced to resign and, therefore, his resignation was a voluntary act, not an unjustified or unwarranted personnel action within the meaning of the Back Pay Act, 5 U.S.C. §5596 (1970).
2. Although doctrine of constructive discharge may under certain circumstances be applied to situations where erroneous personnel actions such as threats, coercion, and intolerable working conditions cause Federal employees to resign in circumvention of statutory removal procedures, no such actions were found to have been taken and Department of State may not grant backpay to employee who alleges he was forced to resign unless there is a direct connection between employee's resignation and improper agency action, in order to come within purview of Back Pay Act, 5 U.S.C. §5596 (1970).
3. The authority of the Secretary of State under provisions of 22 U.S.C. §993(b) and (c) (Supp. III, 1973) in implementing Grievance Board recommendations to grant retroactive promotions and additional increases in salary does not provide a basis for granting retroactive pay, allowances and differentials for Foreign Service personnel after their voluntary resignation.

This matter concerns a request for a decision from the Department of State, as to whether it has authority to implement a Grievance Committee recommendation to the Director of Personnel of that Department that Mr. Charles E. King, a former Foreign Service employee be compensated as follows:

" * * * for the difference, if any, between the amount he would have received had he remained an employee of the Medical Division and the amount of compensation actually received by him from other employment. The amount of such compensation to be computed for the period beginning on the effective date of his resignation from the Department through the date on which the final determination of his grievance is made." (Emphasis added.)

The submission from the Department of State contains only a brief summary of the record in this case, providing information essential for our decision but few additional details which would have been useful in gaining a more complete understanding of the facts. The submission indicates that the Grievance Committee which heard Mr. King's grievance was established under 3 Foreign Affairs Manual 1820, as effective to August 1971, and that recommendations made by the Committee under that authority were not binding on the Department.

The information provided indicates that Mr. King resigned from the Department by letter dated July 29, 1971. The reasons he gave for his resignation were that while serving as an employee he had filed several grievances that the Department had failed to adjudicate or remedy, that retaliatory measures had been taken against him while his grievances were pending, and that all these circumstances caused a deterioration of his health which led him to resign. The record indicates that the Grievance Committee found and the Director of Personnel concurred that Mr. King's supervisor had on several occasions persistently hinted that he should seek other employment and had dealt with him in an extremely insensitive and clumsy manner. However, the record also reveals that the Grievance Committee did not recommend that Mr. King be offered reinstatement, although his attorney had requested it to do so. Consequently the issue before us is whether the Department may legally award Mr. King backpay for the period running from his resignation until the resolution of his grievance when his reinstatement has not been recommended.

Backpay for Federal employees is governed by the provisions of the Back Pay Act of 1966 as contained in 5 U.S.C. 85596 (1970), which provides in pertinent part as follows:

"§5596. Back pay due to unjustified personnel action

* * * * *

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

"(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees."

The Civil Service Commission has promulgated regulations implementing the above-quoted statute in 5 C.F.R. Part 550. In this connection 5 C.F.R. 550.801(b) (1974) indicates that the Back Pay statute is " * * * for the purpose of making an employee whole when the employee, on the basis of an administrative determination or timely appeal, is found to have undergone an unjustified or unwarranted personnel action." The kinds of unjustified or unwarranted personnel actions for which backpay is authorized are set forth in 5 C.F.R. 550.803(d) and (e) (1974) which provides as follows:

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"(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

"(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter."

This regulation establishes a two pronged standard for awarding backpay. First, there must be a determination by an appropriate decision making authority that a personnel action taken by an authorized official of an agency was improper or erroneous. Second, the improper or erroneous personnel action must have resulted directly in the withdrawal or reduction of pay, allowances or differentials of an employee. B-179711, June 25, 1974, 53 Comp. Gen. 1054; B-180010, October 31, 1974, 54 id.; B-181069, November 20, 1974, 54 id.; and B-180010, December 2, 1974, 54 id. The information available in the summary of the record indicates only that the Committee determined that Mr. King's supervisor had dealt with him in an insensitive and clumsy manner and that he suggested that Mr. King seek other employment, but these actions may or may not have been in retaliation for grievances he had filed. If it had been found that the supervisor's behavior constituted such retaliation, it could be said that Mr. King had undergone an unjustified personnel action. However, we would still be unable to conclude that the supervisor's actions satisfied the second criteria stated above since there is no finding that they directly resulted in Mr. King's resignation. Mr. King had many courses of action open to him besides resignation from the Department, such as taking extended leave or requesting the intervention of higher level officials.

Although it may have been prompted by the treatment he received the decision to resign rather than to pursue other remedies was his own.

In connection with this case the Department of State has asked whether the doctrine of "constructive discharge" might be applicable. As we understand the meaning of the doctrine as applied in private sector labor relations cases, an employee is constructively discharged when the employer makes working conditions unbearable because of the employee's union activity and through such conduct, induces or forces the employee to resign, thereby constituting an unfair labor practice under the purview of the National Labor Relations Act §8(a)(3) as amended, 29 U.S.C. §158(a)(3) (1970). National Labor Relations Board v. Tennessee Packers Inc., Frosty Morn Division, 339 F. 2d 203 (6th Cir. 1964), N.L.R.B. v. Holly Bra of California, Inc., 405 F. 2d 870 (9th Cir. 1969), J. P. Stevens & Co., Inc. v. N.L.R.B., 461 F. 2d 490 (4th Cir. 1972). By analogy, we are of the opinion that the doctrine of constructive discharge may, under certain circumstances, be applied to Federal employees regardless of union membership or activity inasmuch as statutory procedures must be followed in their removal and these procedures may not be circumvented by inducing or forcing an employee's resignation by improper means. However, to apply this doctrine there would have to be a showing that the employee resigned as a result of threats, coercion or intolerable working conditions. In this connection we point out that even a clear expression by a supervisor of dissatisfaction with an employee's performance without threat of retribution would not constitute a constructive discharge in the private sector either, although the employee resigns as a result thereof. Montgomery Ward & Co., Inc. v. N.L.R.B., 377 F. 2d 452, 459 (6th Cir. 1967). As mentioned before, there was no finding made that the supervisor's actions amounted to a threat of retribution in the present case. Moreover, the Grievance Committee did not recommend Mr. King's reinstatement although his attorney had requested it. In this connection we note that all the cases cited above in which a constructive discharge was found include an offer of reinstatement as part of the remedy. On the basis of the information before us, therefore, we must conclude that Mr. King was not constructively discharged and that his resignation was voluntary.

The Department of State also inquired whether the authority of the Secretary of State to implement recommendations of grievance boards or panels of equal employment opportunity appeals examiners under the provisions of 22 U.S.C. §993(b) and (c) (Supp. III, 1973), has any application to the case before us. We note that this statute provides

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authority for the Secretary to grant retroactive promotions and additional increases in salary for Foreign Service officers and employees only and does not provide a basis for granting retroactive pay, allowances and differentials for Foreign Service personnel after their voluntary resignation. Hence, we are of the opinion that this statute is not applicable in Mr. King's case.

Accordingly, we conclude on the basis of the information before us that there is no legal authority under which the Department may implement the aforementioned Grievance Committee's recommendation as it is presently fashioned.

R. J. ROSEN

| Deputy Comptroller General
of the United States