

*Kirkpatrick
12087*

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20540

FILE: B-207614

DATE: December 9, 1982

MATTER OF: Francis H. Metcalfe

DIGEST:

An employee who resigned after he had received only conditional notice that he would be transferred to another commuting area is not entitled to severance pay. Entitlement to severance pay requires that the resignation occur after the employee receives definite notice not depending on the occurrence of future events, that he will be separated. There must also be compliance with all regulatory requirements, including the type of notice necessary, which does not include conditional notice.

Mr. Francis H. Metcalfe, a former employee of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, was not eligible for severance pay after his resignation because he did not meet eligibility requirements in that he did not receive a definite notice of involuntary separation or transfer to another commuting area before he resigned, as required by 5 C.F.R. § 550.706.

BACKGROUND

Mr. Metcalfe received from his employing office a written request dated February 27, 1981, for six volunteers in his grade range and occupational job series (grades GS-7 and 9, occupational series GS-1854, Inspector) to transfer from his duty station in Bardstown, Kentucky, to specified posts in California. The written notice stated further:

"In the event that we do not receive sufficient volunteers we will select up to five GS-1854-7 & 9 employees from Bardstown to be involuntarily reassigned to the identified vacancies."

B-207614

Mr. Metcalfe's union representative states that by telephone the employing office, also on about February 27, 1981, informed the union representative that six inspectors would be reassigned from Bardstown to California, that one had already volunteered for such reassignment, and that if five additional volunteers were not obtained management would select an additional five inspectors with the least amount of service for transfer to California. Under those criteria Mr. Metcalfe would have been included. The union representative relayed this information to Mr. Metcalfe and other inspectors at Bardstown. By letter of March 19, 1981, the inspectors at Bardstown were informed that any decision on involuntary reassignments would be held in abeyance because further budget and staffing cuts were anticipated. By memorandum of March 20, 1981, Mr. Metcalfe submitted his resignation to be effective March 27, 1981.

On March 24, 1981, the employing office received advance notice of a reduction in force throughout the Bureau of Alcohol, Tobacco and Firearms, to be effective on about June 1, 1981. It stated that specific individual actions had not yet been determined.

Mr. Metcalfe received a letter of May 26, 1981, from the Assistant Director (Regulatory Enforcement), Bureau of Alcohol, Tobacco and Firearms. It referred to the Assistant Director's, memorandum of May 5, 1981, to all GS-1854-7 and 9 inspectors at Bardstown concerning reassignment (not included in our files). It stated:

"There were insufficient volunteers from your office to meet the necessary reassignments to previously identified Posts of Duty in the Western Region.

"Therefore, in the best interest of the Bureau, it is necessary to reassign you to Oakland, CA, as expeditiously as practical. The reassignment is effective June 1, 1981.
* * *

However, Mr. Metcalfe had resigned approximately 2 months before this letter was sent.

Mr. Metcalfe, through his representative, Assistant Counsel of the National Treasury Employees Union, contends that he is entitled to severance pay because of management's early warning by telephone on February 27, 1981, that inspectors at Bardstown, including Mr. Metcalfe, would be transferred to California. The employing office and our Claims Division denied severance pay because before his voluntary resignation he had not received definite notice of a transfer.

DISCUSSION

Title 5 of the United States Code, section 5595(b)(2), provides that an individual "involuntarily separated from service, not by removal for cause on charges of misconduct, delinquency, or inefficiency," is entitled to receive severance pay. This provision, however, requires compliance with "regulations prescribed by the President or such other officer or agency as he may designate" in order to justify severance pay. The agency prescribing these statutory regulations is the Office of Personnel Management. Its regulations authorize severance pay for an employee who resigns only if he receives one of the enumerated types of notice before his resignation. Thus the employee must have been given a specific notice in writing that he is to be involuntarily separated not by removal for cause on charges of misconduct, delinquency, or inefficiency; a general notice of reduction in force announcing that all positions in his competitive area will be abolished or transferred to another commuting area; or a notice proposing to separate him for declining to accompany his activity when it is to be moved to another commuting area because of a transfer of function. See 5 C.F.R. § 550.706(a). Particularly significant to the present case is paragraph (b) of section 550.706, which states:

"(b) When the facts and circumstances available to an agency show that a resignation under paragraph (a) of this section is unrelated to the issuance of one of the notices specified in that paragraph, separation of the employee by resignation is a voluntary separation under section 5595 of title 5, United States Code."

In other words, any notice other than specified in paragraph (a) is inadequate to qualify an employee who resigns as being involuntarily separated.

The oral and written advice to Mr. Metcalfe before his resignation fell short of meeting the requirements for any one of the alternative notices under 5 C.F.R. § 550-706(a). The telephone notice of February 27, 1981, made any involuntary transfers to California conditional on the failure of sufficient employees volunteering for reassignment. The same is true of the written notice on that date which should have alerted him that his transfer was then uncertain, since it did not specify the number of reassessments, if any. At most, the notice of transfers was contingent on future events, and the February 27 notice did not indicate that the entire Bardstown office would be closed or that all the GS-7 and 9 inspector positions, including Mr. Metcalfe's, would be moved to another duty station in a different commuting area as provided for the general notice in 5 C.F.R. § 550.706(a). We have recently held that a conditional notice of a proposal to abolish positions, depending on the occurrence of future events, failed to satisfy the specific or general notice requirements of 5 C.F.R. § 550.706(a). Matter of Nichols, B-193913, April 16, 1979. Although Mr. Metcalfe's counsel states that the Nichols decision is distinguishable, we think not. In both cases notice was indefinite and conditional.

Significantly, it was only after Mr. Metcalfe resigned that closing of the Bardstown office was announced and Mr. Metcalfe received notice of a transfer to California.

His counsel cites Comptroller General decisions allowing relocation expenses where the employee had reason to believe he would be transferred because of informal notice. Counsel also asserts that we are estopped from denying Mr. Metcalfe severance pay because the express notice he received induced him to act. While considering all the information he had received at the time, he may have believed that transfer of his position was inevitable, that is not sufficient under the regulation to treat a resignation as an involuntary separation. The statutory regulation in paragraph (b) of 5 C.F.R. § 550.706, stating that if a resignation is "unrelated to * * * one of the notices specified in paragraph (b), the separation is voluntary,"

makes the express elements of notice legally mandatory and excludes any other form of notice. Neither the more flexible approach we have exercised in allowing relocation expenses nor the doctrine of estoppel apply to severance pay for employees who resign.

Since at the time Mr. Metcalfe resigned, he had not received one of the types of notice required by the regulations, we cannot conclude that his resignation was an "involuntary" separation to entitle him to severance pay under 5 U.S.C. § 5595. Accordingly, our Claims Group's disallowance of Mr. Metcalfe's claim for severance pay is sustained.

Milton J. Sosler
for Comptroller General
of the United States