The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wanda Pleasant - Severance Pay

File: B-229014

Date: March 2, 1988

DIGEST

An employee sought and received a transfer from a permanent career service position in ACTION to a time-limited appointment for 5 years in the Peace Corps, which could not be extended except for extraordinary reasons. For purposes of the severance pay statute, 5 U.S.C. § 5595 (1982), we find that she was an "employee" and that she was involuntarily separated, i.e., her separation from her position in the Peace Corps was against her will and without her consent. Therefore, the employee is entitled to severance pay.

DECISION

The issue involved in this decision is whether an employee who had previously held a career appointment in ACTION and was subsequently separated from her time-limited appointment with the Peace Corps was "involuntarily separated" from her position within the meaning of that phrase as used in 5 U.S.C. § 5595(b)(2) (1982), and thus is entitled to severance pay. For the following reasons, we hold she was involuntarily separated in that manner and thus is entitled to severance pay.

BACKGROUND

This decision is in response to a joint request from the ACTION/Peace Corps Employees Union, AFSCME Local 2027 (union), and the Peace Corps (agency). This request has been handled as a labor-relations matter under 4 C.F.R. Part 22 (1987), and pursuant to 4 C.F.R. § 22.7(b) (1987), our Office is issuing a decision to the parties on their joint request. The facts of this case, which have been jointly stipulated to by the union and the agency, are as follows.

With the exception of one brief period when she was employed by the U.S. Customs Service, Ms. Wanda Pleasant was an

employee of ACTION from 1977 to 1980. On August 1, 1980, she was converted to career tenure. Subsequently, she applied for and received a position with the Peace Corps without a break in service on October 17, 1981. Her initial appointment with the Peace Corps was an excepted service, time-limited appointment not to exceed April 17, 1984. Her appointment was subsequently extended not to exceed October 17, 1986.

Employees of other agencies who receive a time-limited appointment in the Peace Corps, such as Ms. Pleasant, are no longer entitled to mandatory reinstatement to their former federal positions. Instead, reinstatement is permitted at the discretion of the employing agency.1/ In Ms. Pleasant's case, the Peace Corps' request that she be given reemployment rights was denied by ACTION on November 30, 1981.

At the end of her 5 years of service with the Peace Corps, Ms. Pleasant was separated on October 17, 1986. Her position was not abolished, and there were no reasons such as misconduct, delinquency, or inefficiency for her separation. We note that both the union and the agency have stipulated and the record confirms that Ms. Pleasant is an "employee" as specially defined for purposes of the statute governing severance pay since she transferred directly from a permanent career-tenure appointment in ACTION to the time-limited appointment in the Peace Corps, without a break in service. See 5 U.S.C. § 5595(a)(2)(ii) and (b)(1) (1982). Thus, the only issue for resolution in this case is whether Ms. Pleasant was "involuntarily separated" from her position within the meaning of that phrase as used in section 5595(b)(2) and thus is entitled to severance pay.

The union contends that Ms. Pleasant was involuntarily separated and argues that her case is analogous to our decision in Susan E. Baity, B-223115, Apr. 9, 1987, and to the holding in Sullivan v. United States, 4 Cl. Ct. 70 (1983), affirmed per curiam, 742 F.2d 628 (Fed. Cir. 1984). The agency, while conceding that Baity was correctly

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1/ Compare the previous law, section 528 of the Foreign Service Act of 1946, 22 U.S.C. § 928 (1976), with section 310 of the Foreign Service Act of 1980, 22 U.S.C. § 3950 (1982), effective February 15, 1981.

decided, contends that Ms. Pleasant's case is distinguishable from Baity because Ms. Pleasant did not have mandatory reemployment rights and thus did not have an expectation of unlimited employment. The agency also argues that Ms. Pleasant's separation was not involuntary under the criteria set forth in Sullivan which we relied on in Baity.

DISCUSSION AND ANALYSIS

Entitlement to severance pay is governed by 5 U.S.C. § 5595 (1982) which provides, in relevant part, that:

> "(a) For the purpose of this section--
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> "(1) 'agency' means--
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> "(A) an Executive agency; [and]
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> . . . . .
>
> "(2) 'employee' means--
>
> "(A) an individual employed in or under an agency;
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> . . . . .
>
> "but does not include--
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> . . . . .
>
> "(ii) an employee serving under an appointment with a definite time limitation, except one so appointed for fulltime employment without a break in service of more than 3 days following service under an appointment without time limitation;
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> . . . . .
>
> "(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;

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

We note that neither the statute nor the severance pay regulations in 5 C.F.R. §§ 550.701 et seq. (1986) attempt to further define the phrase "involuntarily separated." However, the United States Claims Court and our decision in Baity have given meaning to those words for the purposes of severance pay.

In Sullivan, the Claims Court considered the case of a career-tenured employee who voluntarily accepted a temporary appointment in another agency. This temporary appointment was renewed twice but was ultimately allowed to expire, and Ms. Sullivan's employment was terminated.

The court in Sullivan noted that the statutory provisions governing eligibility for severance pay due to involuntary separation are to be given a generous construction and that "voluntariness" is a question of fact. Id. at 74-75. Before attempting to define involuntary separation, however, the court noted a deficiency in the Office of Personnel Management's (OPM's) proffered explanation. In Sullivan, OPM contended that severance pay was not designed to aid an employee serving in a position with a definite time limitation because his eventual separation is not unexpected. The government also argued in Sullivan that an employee who resigns voluntarily to accept a term appointment chooses to place himself in a position facing unemployment. Rejecting these arguments, the Sullivan court noted that:

". . . term appointees know from the start they have no right to their positions beyond the period stated. However, this does not establish that when our plaintiff was asked to leave she did so voluntarily." Sullivan, id. at 75.

The Sullivan court then went on to apply OPM's administrative definition in the related area of civil service retirement eligibility to interpret the severance pay statute's meaning of "involuntarily separated." Quoting the Federal Personnel Manual Supplement 831-1, § S11-2a, the court stated that the term "involuntary separation" means:

> "any separation against the will and without the consent of the employee, other than separation for cause on charges of misconduct or delinquency . . . Note, however, that whether a separation is involuntary depends upon all the facts in a particular case; it is the true substance of the action which governs rather than the methods followed or the terminology used." Sullivan, id. at 75.

The Sullivan court then determined that the record clearly refuted any suggestion that Ms. Sullivan's separation was other than against her will and without her consent. The Sullivan court thus held, contrary to OPM's views, that the appropriate point for determining whether a person was involuntarily separated is at the time of actual separation.

In Susan E. Baity, cited previously, our Office followed the Claims Court's definition of "involuntarily separated" for severance pay purposes, which was set forth in Sullivan. After finding that the record in Baity clearly refuted any suggestion that Ms. Baity's separation was other than against her will and without her consent, we noted that "[w]e are bound by the statute and any denial of severance pay based on the unique circumstances of Peace Corps employment would require an amendment to the statute."

In regard to Ms. Pleasant's case, the agency, while conceding that Baity was correctly decided, contends that Ms. Pleasant's case is distinguishable from Baity for two reasons. First, the agency notes that while Ms. Baity had mandatory reemployment rights, Ms. Pleasant had only discretionary reemployment rights under section 310 of the Foreign Service Act of 1980, 22 U.S.C. § 3950 (1982), since she was hired by the Peace Corps after February 15, 1981, the effective date of that Act. Secondly, the agency argues that the expiration of Ms. Pleasant's appointment was not an

involuntary separation because she did not have an expectation of unlimited employment.

In regard to its first contention, the agency's argument is based to a large extent on informal advice from the Office of Personnel Management (OPM) in a letter to the Peace Corps, dated August 2, 1982. In this letter, which was written before the Claims Court's decision in Sullivan and our Office's decision in Baity, OPM expressed the view that the severance pay regulation for employees with mandatory reemployment rights, 5 C.F.R. § 550.701(b)(1)(vi), does not apply to employees who have only discretionary reemployment rights.

It is true that Ms. Pleasant did not have mandatory reemployment rights but only discretionary reemployment rights under section 310 of the Foreign Service Act of 1980, 22 U.S.C. § 3950 (1982), since she was hired by the Peace Corps after February 15, 1981, the effective date of that Act. Furthermore, it is also true that the severance pay regulation for employees with mandatory reemployment rights, 5 C.F.R. § 550.701(b)(1)(vi), does not apply to employees who have only discretionary reemployment rights, and that, indeed, the severance pay regulations in 5 C.F.R. Part 550.701 do not specifically mention employees with discretionary reemployment rights. However, by virtue of the "exception clause" of 5 U.S.C. § 5596(a)(2)(ii) (1982), quoted above, an employee, such as Ms. Pleasant, who was appointed for fulltime employment without a break in service of more than 3 days following service under an appointment without time limitation is clearly an "employee" for purposes of entitlement to severance pay. The fact that OPM's regulations do not specifically deal with coverage of an employee under these specific circumstances cannot serve to defeat a statutory entitlement to severance pay. See Sullivan v. United States, 4 Cl. Ct. 70, 72-74 (1983). Thus, the fact that Ms. Pleasant had only discretionary reemployment rights is irrelevant as to whether she is an "employee" for purposes of the severance pay statute.

The agency's second contention is that the expiration of Ms. Pleasant's appointment was not an involuntary separation because she did not have an expectation of unlimited employment. This contention is essentially the same as OPM's "presumption theory," which the Claims Court rejected

in Sullivan. Both Sullivan and Baity, cited previously, demonstrate that the appropriate point for determining whether a person was involuntarily separated is at the time of actual separation.

In regard to Ms. Pleasant's separation, the record here shows that her separation was against her will and without her consent at the time of actual separation. There is no evidence to suggest that Ms. Pleasant could have stayed on or that she consented to be separated. Based on the criteria enunciated in the Claims Court's decision in Sullivan and our decision in Baity, we conclude that Ms. Pleasant was "involuntarily separated from the service" within the meaning of 5 U.S.C. § 5595(b)(2) (1982). As we noted above, Sullivan demonstrates that the appropriate point for determining whether a person was involuntarily separated is at the time of actual separation. Thus, Ms. Pleasant's expectations at the beginning of her time-limited appointment are not necessarily material to the determination of whether he was involuntarily separated. Furthermore, as we likewise noted in Baity, we are bound by the language of the severance pay statute, and any denial of severance pay based on the unique circumstances of Peace Corps employment would require an amendment to the statute.

Accordingly, we conclude that Ms. Pleasant's separation from the Peace Corps was involuntary as required by 5 U.S.C. § 5595(b)(2) (1982), and we hold that she is entitled to receive severance pay.

Milton J. Socolar

Comptroller General
of the United States