

DOCUMENT RESUME

07996 - [C3288397]

[Payment of Severance Pay to National Guard Technician].
B-172682. November 20, 1978. 3 pp.

Decision re: M. Sgt. Joseph M. Moyber; by Robert F. Keller,
Deputy Comptroller General.

Contact: Office of the General Counsel: Personnel Law Matters
II.

Organization Concerned: Department of the Air Force: National
Guard Bureau.

Authority: 5 U.S.C. 5595(b). 32 U.S.C. 302. 32 U.S.C. 322. 32
U.S.C. 709(e). 53 Comp. Gen. 493. 50 Comp. Gen. 476.
B-183157 (1975). F.P.H., ch. 550-7.

An opinion was requested as to whether misconduct,
which was the basis for a denial of reenlistment and a
subsequent involuntary separation, constituted grounds for
denial of severance pay. Misconduct which resulted in denial of
reenlistment and caused removal from the National Guard
precluded payment of severance pay. (RBS)

DECISION

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

8397

FILE: B-172682

DATE: November 20, 1978

MATTER OF: Severance pay - National Guard technician

DIGEST: A determination based on reasonable grounds supported by the record that a National Guard member was denied reenlistment on the ground of misconduct, which caused his removal as a National Guard technician, precludes payment to him of severance pay incident to his removal as a technician. 5 U.S.C. 5595(b) (1976).

This action is in response to letter of August 16, 1978, reference NGB-JA, from Major General La Vern E. Weber, USA, Chief, National Guard Bureau, requesting our opinion as to whether the misconduct he describes, which was the basis for denial of Master Sergeant Joseph H. Moyher's request for reenlistment in the National Guard, and his resulting separation as a military technician in the Air National Guard, constituted grounds for denial of severance pay under 5 U.S.C. 5595(b) (1976) as construed in our decision, 53 Comp. Gen. 493 (1974) (H-172682, January 24, 1974). We have also received and considered documents sent to us by Stuart Stiller, Esq., Sergeant Moyher's attorney, concerning this matter.

In 53 Comp. Gen. 493 we stated, at page 495, that:

"It is not reasonable to conclude that whenever an application for reenlistment is rejected that the rejection is tantamount to a 'removal for cause on charges of misconduct, delinquency, or inefficiency' as used in the severance pay statute especially when the failure to accept the reenlistment is not shown to have been for such causes. Consequently, except when it is reasonably established that the reason for failure to accept an application for reenlistment is for cause based on charges of misconduct, delinquency or inefficiency, on the part of the enlisted member, it is our view that the automatic separation from the civilian position would entitle the technician to severance pay."

B-172682

General Weber states that in response to that decision, paragraph 7-4f of the National Guard Bureau's Technician Personnel Supplement to the Federal Personnel Manual, chapter 550-7 (November 1, 1975), was promulgated, stating:

"Failure to accept reenlistment. The failure to accept an enlisted technician's reenlistment application is an involuntary separation for severance pay purposes except when it can be reasonably established that failure to accept the application is for reason of misconduct, delinquency or inefficiency."

General Weber states that Sergeant Moyher's reenlistment was not accepted "for reason of misconduct," and pursuant to the above-cited regulation he was denied severance pay. The record indicates that the misconduct in question was stated to be: "deliberate and progressively disruptive actions since 1976," which undermined the morale and discipline of his unit and to have been "totally inconsistent with the responsibility of a senior noncommissioned officer in a leadership position." These actions included specifically: intentionally and actively attempting in April 1977, to persuade flight members to make themselves unavailable for deployment and making disapproving and critical comments about his commanders while in the presence of airmen junior to him in grade. Sergeant Moyher was advised of these grounds for denial of severance pay, in a letter dated July 20, 1978.

The determination of the reasons for, and the separation of or denial of requests for reenlistment of enlisted members of the National Guard are matters within the jurisdiction of the Secretary concerned. 32 U.S.C. 302 and 322 (1976). When a National Guard technician employed in a position requiring membership in the National Guard is separated from the Guard, he is to be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned. 32 U.S.C. 709(e)(2) (1976).

We have held that the question of what constitutes "cause" for removal for misconduct, etc., as provided in 5 U.S.C. 5595(b), is one which is primarily for determination by the agency involved in the action. Absent any indication in the

B-172682

record that the agency determination was arbitrary or capricious, the agency decision should not be disturbed. See B-183157, April 1, 1975; 50 Comp. Gen. 476 (1971). In this instance there was a determination to deny reenlistment (which carried with it subsequent removal as a technician) on the basis of misconduct. That determination appears to be supported by reasonable grounds in the record, and it does not appear to be arbitrary or capricious.

Based on the foregoing, we believe that the denial of severance pay was proper, in these circumstances.


Deputy Comptroller General
of the United States