DECISION

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

FILE: 160221 DATE: NOV 26 1975 097676 U97676

MATTER OF: B-181329

DIGEST: Mary A. Miguel - Claim for retroactive promotion after reemployment following break in service

1. Where employee, who was interviewed for new position on last day of LWOP, suffered 11-day break in service due to processing of appointment, employee may not have separation date from prior position changed to avoid break in service and thereby obtain pay adjustment since she was not entitled to LWOP under agency regulations and she could not use annual leave when it was known she would not return to duty at previous post.

2. Employee, who was interviewed for new position on last day of LWOP, suffered 11-day break in service. Employee claims additional pay on ground she would have been appointed at higher salary but for break in service caused by misinformation by agency employee. There is no entitlement since record indicates break in service resulted from normal time required to process appointment, not misinformation.

3. Where employee suffered break in service allegedly due to reliance upon misinformation from personnel officer regarding pay adjustment and effect of break in service, employee has no legal basis for claim for additional pay she would have received but for break since United States is not liable for negligent or erroneous acts of its agents.

4. Where employee suffered break in service allegedly due to reliance upon misinformation from personnel officer regarding pay adjustment and effect of break in service, employee is not entitled under Back Pay Act, 5 U.S.C. § 5596, to additional pay she would have received but for break. Employee fails to meet two-pronged standard that action was found to be improper or erroneous by appropriate authority and that such action resulted directly in loss of pay.

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This action is a reconsideration of the denial on January 21, 1975, by our Transportation and Claims Division, of the claim of Mrs. Mary A. Miguel for backpay believed due when she was reemployed at the lowest step in grade rather than the highest step because of a break in service. The claim was disallowed on the ground that there was no authority to change the claimant's resignation date from her previous position in order to avoid a break in service.

The record indicates that Mrs. Miguel was employed at March AFB, California, until her husband's retirement from the military. The claimant then requested and was granted 90 days of leave without pay (LWOP) in order to seek another position near where she and her husband intended to establish a new residence. Mrs. Miguel was interviewed and "accepted" for a new position at Robins AFB, Georgia, on March 18, 1971, her last day of LWOP, but her appointment was not effective until March 29, 1971, which resulted in an 11-day break in service. It appears that if there had not been a break in service the claimant would have been placed at the level of GS-4, step 10, instead of GS-4, step 1.

As noted in our Transportation and Claims Division settlement, Mrs. Miguel was not entitled to any LWOP under these circumstances under the applicable Air Force regulations. The error made in granting her LWOP was to her benefit, and had she found a position and been appointed within the 90-day period, there would have been no break in service. In this connection our Office has permitted the retroactive adjustment of the effective date of a separation to include a period of annual leave or LWOP in order to eliminate an unintended break in service. However, in each case such a correction was made in circumstances where it was known prior to the employee's resignation that he was resigning in order to accept another position within the same or another agency and it was the intent of all of the parties concerned that the transfer be effected without a break in service. The facts presented in this case are different since Mrs. Miguel did not have another position waiting when she began her LWOP. The Settlement Certificate also noted that it would not be proper to grant the claimant annual leave in light of the applicable Air Force regulations and our decisions where it was known that she would not be returning to duty at March AFB. 34 Comp. Gen. 61 (1954).

On appeal Mrs. Miguel states that it was a misrepresentation which was made to her at Robins AFB which caused the unintended break in service. She states that she was interviewed at Robins AFB on March 18, 1971, the last day of her LWOP, by Mr. Walter Watkins. Mrs. Miguel says that Mr. Watkins advised her that there were openings at a GS-4 position but that she was not eligible for a salary adjustment based on her previous employment at March AFB as a GS-5, step 7. The claimant states further that she was advised to return for "in-processing" on March 29, that she objected to this date because it would be outside her LWOP period, but that she was told by Mr. Watkins that it would make no difference because she was not entitled to a salary adjustment. Mrs. Miguel argues that this information was incorrect, that Mr. Watkins was without the authority to make decisions regarding pay adjustments, and that she would have been entitled to a salary adjustment but for the break in service. Her "Petition for Reconsideration" states further:

> "Had not Mrs. Miguel been given this misinformation, she could have avoided the break in service. She had previously contacted a former employer at Robins AFB, Mr. Lester Carter, who had accepted her for employment. There is no question that Mrs. Miguel, with Mr. Carter's help, could have accomplished in-processing on the day that she reported in had she attempted to do so. No such attempt was made because she was operating under the misinformation given her by Mr. Watkins."

The administrative report indicates that Mr. Carter interviewed Mrs. Miguel on March 18 and accepted her for a position at Robins AFB. The report continues that it was necessary for him to execute a manpower change request and submit a new SF-52. Finally, the report states that the day that an employee is interviewed is not necessarily the effective date that an employee is transferred or hired and that all effective dates for reinstatement actions are coordinated with employees. Based upon the record before us, it is not certain that Mrs. Miguel's reinstatement could have been accomplished without a break in service by allowing for the normal amount of time for processing personnel actions.

Mrs. Miguel states that under the pay adjustment policy in effect at Robins AFB she was eligible for a rate in her grade level which would preserve her previous rate at GS-5, step 7.

Civil Service regulations, as set forth in 5 C.F.R. § 531.203(c) (1971), permit each agency to formulate its own policy regarding the application of the highest previous rate rule. Pertinent Air Force regulations, AFR 40-521 and AFLC Sup. 1 to that regulation, established a policy which attempted to preserve the employee's rates where possible. By letter dated November 22, 1972, Robins AFB reported that the highest previous rate was not applicable to a reemployment or reinstatement situation, but in a subsequent letter, dated December 14, 1972, Robins AFB correctly reported that Mrs. Miguel's pay would have been adjusted but for the break in service.

Our Settlement Certificate stated:

> "We have also approved of retroactive adjustments in situations where employee attempts to prevent a break in service have been thwarted by an agency's misapplication of its own regulations or where misrepresentation by the administrative office has resulted in an unintended break in service."

Mrs. Miguel argues that Mr. Watkins' statements constituted a misrepresentation by an administrative office resulting in an unintended break in service. She argues further that her attempt to prevent a break in service was thwarted by the agency's misapplication of its own regulations in that Mr. Watkins "unilaterally made all pertinent decisions governing Mrs. Miguel's employment" by incorrectly interpreting the regulations on pay adjustment and by "operating in an area in which he lacked authority." The facts in this case do not appear applicable to our previous decisions involving misapplication of regulations.

Based on the record before us, it appears that Mr. Watkins misinformed Mrs. Miguel on the day of her interview as to her entitlement to a salary adjustment and as to what effect a break in service would have on her salary adjustment. However, as we stated in our decision B-171969, November 14, 1973:

> "* * * we have consistently held that the receipt by one dealing with a Government official of erroneous information does not afford a legal basis for payment of the claim. B-176040, June 30, 1973. The United States has power to act only through its agents whose authority, and the manner of exercise thereof, is prescribed and limited by statute, regulation and administrative and judicial determination. 46 Comp. Gen. 348 (1966). In the absence of specific authority

therefor, the United States is not liable for the negligent or erroneous acts of its officers, agents or employees, even though committed in the performance of their official duties. 44 Comp. Gen. 337, 339 (1964). To make the Government liable for such unauthorized acts, would, in effect, permit agents of the Government to obligate the United States in direct contravention of those limitations and prescriptions and nullify the basic purposes of the statutes, regulations and determinations. 46 Comp. Gen. 348, supra. While it is regrettable that you may have been misled by the erroneous information, your rights are for determination only on the basis of the facts and the applicable statute and regulations rather than on such erroneous information."

The rule in the above case is based on court cases cited in 44 Comp. Gen. 337 and 46 id. 348.

Finally, Mrs. Miguel argues that the action of Mr. Watkins constituted an "unjustified or unwarranted personnel action" within the meaning of 5 U.S.C. § 5596 (1970). Whether a retroactive promotion is permissible depends on whether the facts of the case come within the purview of the above-cited statute which provides, in subsection (b):

"(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."

The Civil Service Commission has promulgated regulations under the Back Pay Act of 1966, which read in pertinent part as follows:

"(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." 5 C.F.R. 550.803 (d) and (e).

The Civil Service regulations establish 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 was improper or erroneous. Second, such action must have resulted directly in the withdrawal or reduction of pay, allowances or differentials of an employee. It does not appear that either standard has been met. As noted above, while Mr. Watkins may have misinformed Mrs. Miguel on the day of the interview, it is not certain that such misinformation directly resulted in a loss of pay for Mrs. Miguel in light of the time delay incurred in processing the appointment.

Accordingly, we must sustain the action of the Transportation and Claims Division in disallowing Mrs. Miguel's claim for backpay.

R.F. KELLER
Deputy Comptroller General
of the United States