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D. Weiskopf CP

DECISION



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

FILE: B-187184

DATE: April 3, 1978

MATTER OF: Robert S. Mulhern - Back Pay and Reinstatement

DIGEST: Former civilian employee's claim for back-pay and reinstatement, based upon allegations that his transfer from the Small Business Administration (SBA) Milwaukee Branch Office to the SBA Springfield Branch Office was wrongful and coerced his resignation, is disallowed since there has been no finding of an unjustified or unwarranted personnel action by an appropriate authority.

This action is in response to a letter dated December 27, 1977, from Robert S. Mulhern requesting reconsideration of our decision of March 2, 1977, B-187184, which disallowed his claim for reimbursement of certain travel expenses and per diem in connection with his transfer from the Small Business Administration (SBA) Branch Office in Milwaukee, Wisconsin, to the SBA Branch Office in Springfield, Illinois. In addition, Mr. Mulhern now claims reinstatement to the position SBA Loan Processing Officer, which he occupied in Milwaukee, and backpay from the effective date of his resignation to reinstatement.

Mr. Mulhern does not suggest our decision of March 2, 1977, was erroneous, nor does he raise new questions of fact or law with regard to his claim for reimbursement of travel expenses and per diem. Nevertheless, we have reviewed our previous decision and conclude that it was properly decided. Mr. Mulhern now makes a claim for reinstatement and backpay.

The facts of this case were set forth fully in our previous decision of March 2, 1977, and need not be repeated except as pertinent to the present discussion of the case. Briefly restated, the record shows that claimant was employed as a Loan Officer in the Milwaukee Branch Office of the SBA. By letter dated March 25, 1974, the Regional Director advised Mr. Mulhern that he was being reassigned to the position of Loan Specialist in the Springfield

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Branch Office effective April 20, 1974, for the benefit of the SBA. On April 2, 1974, Mr. Mulhern orally advised the Acting Branch Manager of the Milwaukee Branch Office that he was contesting the transfer on the grounds that it was arbitrary and punitive in nature. By letter dated April 19, 1974, the Regional Director responded that after re-examining the basis for the transfer it was his judgment that the transfer would serve the best interests of SBA because it was essential to the overall efficiency of SBA Region V that a person skilled in loan making and other financial program activities be assigned to the Springfield Branch Office.

Mr. Mulhern reported to the Springfield Branch Office as ordered and on May 10, 1974, filed a formal grievance with the SBA seeking, among other things, reassignment to the Milwaukee Branch Office and full reimbursement of all expenses incurred incident to the transfer to the Springfield Branch Office. On May 30, 1974, the SBA declined to take action on Mr. Mulhern's grievance. Claimant thereupon resigned effective June 14, 1974.

The claim for backpay and reinstatement is based upon Mr. Mulhern's allegation that SBA coerced his resignation through a transfer which was arbitrary and capricious and punitive in nature. Mr. Mulhern also insinuates that his transfer constituted a reduction in rank within the SBA.

Entitlement to backpay is governed by 5 U.S.C. 5596(b) (1970) which provides in pertinent part:

"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

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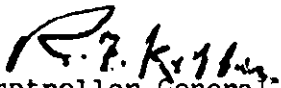
which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred less any amounts earned by him through other employment during that period * * *."

Under the above-cited statute, in order to recover backpay there must be a finding by appropriate authority that the employee has undergone an unjustified or unwarranted personnel action. The appropriate authority to make a finding of an unwarranted personnel action initially is the employee's agency, with right to appeal to the United States Civil Service Commission (CSC). In Government employee separation cases where the issue of voluntariness with respect to a resignation is raised, there should be a hearing before the CSC to determine the facts. Goodman v. United States, 358 F.2d 532. The CSC has the function of hearing and deciding appeals which assert wrongful separations from Federal service. A separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency. Dabney v. Freemann, 358 F.2d 533. If the CSC finds that the resignation in the present case was involuntary, then the separation from Government employment constituted a discharge, then Mr. Mulhern would be entitled to reinstatement.

Therefore, in the absence of a finding by the appropriate authority, i.e., the agency or the CSC, that Mr. Mulhern has undergone an unjustified or unwarranted personnel action, i.e., wrongful separation from Federal service Mr. Mulhern is not entitled to backpay. Such a finding cannot be made by this Office. The record in this case does not reflect such a finding by the agency or the CSC.

Accordingly, Mr. Mulhern's claim for backpay and reinstatement is disallowed.

Deputy


Comptroller General
of the United States