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DECISION



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

FILE: B-188634

DATE: December 16, 1977

MATTER OF: Robert J. Hellrung - Entitlement to
Severance Pay

DIGEST: The Legal Services Corporation, created by Pub. L. 93-355, 42 U.S.C. § 2996, assumed responsibility for the Office of Legal Services, Community Services Administration (CSA), on October 14, 1975. Employee was separated by reduction in force from CSA on June 25, 1976, and was later employed by the Legal Services Corporation effective June 29, 1976. His entitlement to severance pay is not affected by 5 U.S.C. § 5595(d), because employment with the Legal Services Corporation does not constitute employment with Government of United States or government of District of Columbia. Nor is the entitlement to severance pay affected by 5 C.F.R. § 550.701(b)(5), because comparable employment was not offered or accepted within 90 days of replacement date.

This decision is in response to a request dated January 4, 1977, from Mr. Roy B. Hogg, an authorized certifying officer of the Community Services Administration (CSA), concerning the eligibility of Mr. Robert J. Hellrung for severance pay in the amount of \$3,513.60, and dependent upon the determination in Mr. Hellrung's case, whether corrective action should be initiated to pay "all the others who were advised to resign from their positions in order to accept employment with the [Legal Services] Corporation."

The Legal Services Corporation Act of 1974 (Pub. L. 93-355) 42 U.S.C. §§ 2996 et seq., provided that the Legal Services Corporation would assume the responsibility for the functions of the Office of Legal Services, CSA. This was done on October 14, 1975. Prior to October 10, 1975, Mr. Robert J. Hellrung was the Regional Director of the Office of Legal Services, CSA, in Seattle, Washington. On October 10, 1975, Mr. Hellrung received a "General Reduction-in-Force" notice, with an expiration date of

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December 15, 1975. Mr. Hellrung was not offered a position with the Legal Services Corporation at that time, and in fact another individual was recruited to become Regional Director for the Corporation's Seattle Regional Office.

On October 14, 1975, Mr. Hellrung was detailed from the Office of Legal Services to the Office of Administration, CSA. The time constraint on the detail was "not to exceed 11/30/75." Subsequent extensions of the detail were as follows: "not to exceed 12/31/75;" "not to exceed 1/31/76;" "not to exceed 2/10/76;" "not to exceed 4/15/76;" "not to exceed 5/15/76;" and "not to exceed 6/9/76."

In a letter dated May 25, 1976, from the Director of Personnel, Mr. Hellrung was informed in a specific reduction-in-force notice that he would be separated from the CSA effective June 25, 1976. This letter also informed Mr. Hellrung of his entitlement to severance pay in the amount of \$3,513.60.

On June 3, 1976, the Board of the Legal Services Corporation adopted a Revised Regional Alignment Proposal which established, for the first time, positions for more than one attorney in the Seattle Regional Office. Subsequent to June 3, 1976, Mr. Hellrung negotiated with the Legal Services Corporation to become employed in that office effective June 29, 1976. The employment was subordinate to the Corporation's Regional Director, and required a reduction in Mr. Hellrung's annual salary.

On September 24, 1976, Mr. Hellrung was informed by letter from the Director of Personnel for the CSA, that his entitlement to severance pay became inappropriate upon his employment with the Legal Services Corporation. The Director of Personnel cited the following authority to support his decision.

Title 5 of the United States Code, section 5595(d) provides:

"If an employee is reemployed by the Government of the United States or the

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government of the District of Columbia before the end of the period covered by payments of severance pay, the payments shall be discontinued beginning with the date of reemployment and the service represented by the unexpired portion of the period shall be reccredited to the employee for use in any later computations of severance pay. For the purpose of subsection (b)(1) of this section, reemployment that causes severance pay to be discontinued is deemed employment continuous with that serving as the basis for severance pay."

Section 550.701(b)(5) of title 5, Code of Federal Regulations states:

"(5) This subpart does not apply to an employee of an agency or a subdivision thereof who when the agency or a subdivision thereof is replaced by a public non-Federal organization created in whole or in part pursuant to an Act of Congress, is offered employment comparable to his employment in the agency at the time of replacement, or within 90 days of the date of replacement accepts any employment, with the successor public non-Federal organization."

In response to this letter, Mr. Hellrung wrote to the Director of Personnel on October 22, 1976, setting forth his understanding of his entitlement to severance pay, and requesting a review of the issue by the Office of the General Counsel, CSA. On November 29, 1976, the Office of the General Counsel forwarded to the Director of Personnel, CSA, a memorandum stating an opinion on the relevant issues, and concluding that Mr. Hellrung was entitled to severance pay. The certifying officer remains at variance with the opinion on Mr. Hellrung's claim, and in presenting his interpretation has asked this Office for an advance decision in answer to his questions set forth above.

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Pursuant to our statutory authority this Office generally renders formal decisions to certifying officers on questions of law involved in the payment of specific vouchers which should accompany the request to our Office. B-186449, January 24, 1977. While no voucher accompanied the instant request for a decision, the problem presented may be recurring, and we are rendering this decision under the broad authority of 31 U.S.C. § 74, under which we may render decisions to heads of departments on any question involved in payments which may be made by such departments. 52 Comp. Gen. 83, 84 (1972); and 53 id. 71, 72 (1973).

In response to the question concerning Mr. Hellrung's eligibility for severance pay, many of the significant facts which form the basis for the claim were established and set forth in our decision B-186449, January 24, 1977. In that decision we analyzed the statutory provisions and legislative intent of Pub. L. 93-355, which created the Legal Services Corporation, and found that:

"The Legal Services Corporation was established in the District of Columbia as a private nonmembership, nonprofit corporation for the purpose of providing financial support for legal assistance in noncriminal matters to persons financially unable to afford legal assistance."

The language of Pub. L. 93-355 carefully defines the character and construction of the Legal Services Corporation. Section 1005(e)(1) of the law states that except for other express provisions of the title:

"* * * officers and employees of the Corporation shall not be considered officers or employees, and the Corporation shall not be considered a department, agency, or instrumentality, of the Federal Government."

There is an express provision contained in section 1005(f) of Pub. L. 93-355, that officers and employees of the Corporation shall be considered officers and employees of the Federal Government for the specifically stated purpose of compensation for work injuries, civil

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service retirement, life insurance, and health insurance. However, compensation is defined in section 1005(d) of Pub. L. 93-355 as follows:

"Officers and employees of the Corporation shall be compensated at rates determined by the Board, but not in excess of the rate of level V of the Executive Schedule specified in section 5316 of title 5, United States Code."

While section 5316 of title 5, United States Code, may be interpreted here as providing a ceiling for rates of compensation for Government employees, it is of greater significance that the rates of compensation for officers and employees of the Corporation are to be determined by the Board of the Corporation, and not by statute. The powers and prerogatives of the Corporation are further defined and delegated by express provisions of section 1006(a) of Pub. L. 93-355, stating that the Corporation shall exercise the powers conferred upon a nonprofit corporation by title 29 of the District of Columbia Nonprofit Corporation Act, which provides at section 29-1005 of the District of Columbia Code that:

"Each corporation shall have power--

"(k) to elect or appoint officers and agents of the corporation, and define their duties and fix their compensation."

It is clear that employees of the Legal Services Corporation are not considered Federal employees, except for the limited purposes specified in section 1005(f) of Pub. L. 93-355. Further amplification is provided by the legislative history of the Legal Services Corporation Act. Report of the Senate Committee on Labor and Public Welfare, Senate Report No. 93-495, 93d Cong., 1st Sess., p. 12, states in pertinent part:

"These subsections provide that all officers and employees of the Corporation are to be

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treated as private employees except for certain rights and benefits of employees of the Federal Government (work injuries, retirement, and health and life insurance). The Corporation shall be considered private nonprofit entity for all statutory purposes, including those concerning labor relations, except as provided elsewhere in the Act." (Underscoring added.)

This Office is in agreement with the Office of the General Counsel, CSA, in finding that provisions of 5 U.S.C. § 5595(d), are not applicable to Mr. Hellrung's claim. The Legal Services Corporation Act, pertinent portions of the legislative history of that Act, and our decision in B-186449, January 24, 1977, clearly establish that the Legal Services Corporation is neither an agency nor an instrumentality of the Federal Government or the government of the District of Columbia. Therefore, Mr. Hellrung was not reemployed by the Government of the United States, or the government of the District of Columbia.

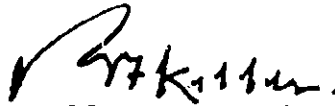
As noted above, 5 C.F.R. § 550.701(b)(5) excludes from severance pay employees whose employing organization is replaced by a public non-Federal organization and who are offered comparable employment with the successor entity at the time of replacement or who accept such employment within 90 days of the replacement. The regulation clearly refers to the concept of "replacement" as meaning the time when the functions of the predecessor employer are transferred to the successor organization. The legislation establishing the Legal Services Corporation clearly directed that the Corporation would assume the functions of the programs administered by the Office of Legal Services, CSA. That transfer of function occurred on October 14, 1975. The record further shows that Mr. Hellrung was not offered a position with the Legal Services Corporation when that organization assumed the responsibility for the Office of Legal Services, CSA, and in fact another individual was selected for his former position. After receipt of a specific reduction-in-force notice, Mr. Hellrung negotiated for employment with the Seattle Office of the Legal Services Corporation. On

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June 29, 1976, more than 8 months after the transfer of functions, he accepted a position which was subordinate to the Corporation's Regional Director, and required a reduction in salary. Therefore, the strictures of 5 C.F.R. § 550.701(b)(5) do not apply to Mr. Hellrung's claim because he did not accept any employment with the successor agency within 90 days of his replacement.

Therefore, there is no legal basis presented on which to deny Mr. Hellrung's claim for severance pay. Accordingly, if otherwise correct, the claim may be certified for payment.

The certifying officer also asks if corrective action should be initiated "* * * to pay all the others who were advised to resign from their positions in order to accept employment with the [Legal Services] Corporation." The record does not present facts sufficient to establish with certainty the legal basis of the claims of the "others." We note, however, that the other employees evidently voluntarily resigned from CSA in order to accept positions elsewhere. Under 5 U.S.C. § 5595(b)(2), severance pay may be paid only to persons who are involuntarily separated from Government service, not by removal for cause on charges of misconduct, delinquency, or inefficiency. It would appear, therefore, that severance pay would not be appropriate in the case of an employee who voluntarily resigns to accept other employment.


Deputy Comptroller General
of the United States



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

John Hancock
CP

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December 16, 1977

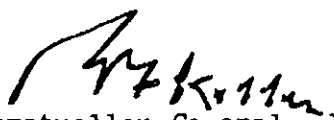
Mr. Roy B. Hogg
Authorized Certifying Officer
Community Services Administration
Washington, D.C. 20506

Dear Mr. Hogg:

This is in response to your letter dated January 4, 1977, requesting our decision concerning the eligibility of Mr. Robert J. Hellrung for severance pay. By our decision of today, B-188634, we have determined that under the applicable statutes and regulations, Mr. Hellrung is eligible for a payment of severance pay. Considering the views expressed in your submission, however, we have written to the Civil Service Commission suggesting that a review of present regulations be made in order to determine whether any modifications or amendments should be made.

Sincerely yours,

Deputy


Comptroller General
of the United States



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

Shirley Lambert
GN

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December 16, 1977

The Honorable Alan K. Campbell, Chairman
United States Civil Service Commission
Washington, D.C. 20415

Dear Mr. Campbell:

We have considered a claim by a former Government employee for severance pay incident to his separation by reduction in force on June 25, 1977, from his employment with the Office of Legal Services Corporation, Community Services Administration (CSA). The Legal Services Corporation (Corporation), a public non-Federal organization, had assumed the functions of that division of CSA on October 14, 1975. Four days after his separation from CSA, the employee obtained employment with the Corporation. Based on regulations prescribed by the Civil Service Commission, we hold in our decision of today, Robert J. Hellrung, B-188634, that the employee is entitled to severance pay. In reaching this result, we first concluded that the Corporation was not an arm of the Governments of the United States or the District of Columbia within the meaning of 5 U.S.C. 5595(d) (1970). In addition, we determined that employment with the Corporation was not offered to or accepted by the employee within 90 days of the assumption by the Corporation of the functions formerly administered by CSA, as required by 5 C.F.R. 550.701(b)(5) to exclude an employee from severance pay benefits.

We note, however, that the Court of Claims, in Akins v. United States, 439 F.2d 175, 178 (1971), stated:

"We do not believe that Congress intended to mandate extension of coverage of the Act to an employee who is offered and accepts comparable employment with a successor public non-Federal agency at the same grade and at an equivalent or higher salary, and who does not miss one working day during the transitional period."

The Court went on to hold that the regulation prescribed by the Commission at 5 C.F.R. 550.701(b)(5) was a valid exercise of the discretion vested in the Commission by 5 U.S.C. 5595(a)(2)(viii).


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We believe that the view expressed by the Court of Claims would support a denial of the Hellrung claim, but for the fact that the present regulation, 5 C.F.R. 550.701(b)(5) contains the 90-day limitation. Since the limitation applies from the date of the transfer of functions, it does not cover Mr. Hellrung even though he joined the successor corporation 4 days after he left CSA.

In view of the position of the Court of Claims and the legislative history to the severance pay statute, we suggest that a review of the present regulations be made in order to determine whether any changes are necessary.

Sincerely yours,

Deputy


Comptroller General
of the United States