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**DECISION**



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

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FILE: B-191814

DATE: January 15, 1979

CLAIM FOR

MATTER OF: Richard E. Berger - Reinstatement and Backpay ]

**DIGEST:** Former civilian employee's claim for reinstatement and backpay, based upon allegation that his resignation from the Department of Housing and Urban Development was involuntary because it was based upon false and misleading information, is disallowed since there has been no finding of an unjustified or unwarranted personnel action by an appropriate authority.

Mr. Richard E. Berger requests reconsideration of a settlement (Z-2789222) by the Claims Division of this Office, dated February 28, 1978, which disallowed his claim for reinstatement to his former position and retroactive adjustment of his salary to reflect continued employment with the Department of Housing and Urban Development (HUD).

The record indicates that Mr. Berger was employed by HUD as an auditor from February 9, 1970, to the date of his resignation on June 24, 1972. Mr. Berger alleges that his resignation was involuntary because it was based upon false and misleading information supplied by his supervisors. The claimant states that if notification of his acceptance into a retraining program was not withheld from him, he would not have resigned since his resignation was prompted by a belief in a future reduction in staff. In addition, Mr. Berger asserts that notice of the cancellation of a contemplated reduction of force was withheld from him until 3 days following the effective date of his resignation. On the basis of these facts, Mr. Berger requests that he be compensated for backpay lost since the date he resigned, as well as being reinstated to his former position.

Mr. Berger challenged the refusal of HUD to reinstate him and to compensate him for backpay to the United States Civil Service Commission (CSC). On October 7, 1974, the claimant requested that the Federal Employees Appeals Authority, Seattle Field Office, review the circumstances surrounding his resignation. The Appeals Authority denied the request stating that Mr. Berger's challenge was untimely and that there was no

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reasonable basis for concluding that circumstances beyond his personal control prevented him from pursuing his claim with due diligence. Upon the claimant's request, the Appeals Review Board of the CSC reviewed the determinations of the Seattle Field Office. On March 21, 1975, the Appeals Review Board affirmed the decision of the Seattle Office. On November 7, 1977, the CSC refused to reopen and reconsider the appeal, thereby exhausting the administrative appeal rights within the CSC. Mr. Berger then requested our Office to consider his claim for reinstatement and backpay.

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

"(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 \* \* \*."  
(Emphasis added.)

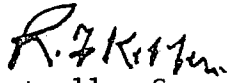
The appropriate authority to make a finding of an unwarranted personnel action initially is the employee's agency with the right to appeal to the CSC. Matter of Robert S. Mulhern, B-187184, April 3, 1978, and Matter of Roselyn S. Hamilton, B-188825, June 10, 1977. A separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency. Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1965). The CSC has the function of hearing and deciding appeals which assert wrongful separation from Federal service. 5 U.S.C. § 7501 (1970); 5 C.F.R. § 752.203 (1974); Matter of Warren J. Payne, Sr., B-181583, December 23, 1974; and Goodman v. United States, 358 F.2d 532 (D.C. Cir. 1966). However, a Government employee is entitled to

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a hearing on his allegation of an involuntary resignation only upon a timely appeal to the CSC. Gratehouse v. United States, 512 F.2d 1104 (1975).

The Seattle office of the CSC Appeals Authority has made a determination that Mr. Berger's appeal is untimely. The decision of the Office of the CSC having appellate jurisdiction is final. However, either party to the appeal may petition the CSC Appeals Review Board to reopen and reconsider the decision. 5 C.F.R. § 752.203(b). After Mr. Berger's petition to the Appeals Review Board to reopen and reconsider his case had been denied, he appealed to the civil service commissioners. They refused to reopen his case and advised him that he had exhausted his administrative remedies. Therefore, his claim is not subject to review by the General Accounting Office. Hamilton, supra, and 5 C.F.R. § 772.310(g).

Accordingly, since there has been no administrative determination by the appropriate authority that Mr. Berger has undergone an unjustified or unwarranted personnel action, we must sustain the action of the Claims Division in disallowing the claim for backpay and reinstatement.

  
Deputy Comptroller General  
of the United States