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Request for Reconsideration of

FILE: B-195654

DATE: November 27, 1979

MATTER OF: John R. McCauley - Claim for Backpay

DIGEST: Employee unofficially notified of selection for vacancy and reporting date which was delayed due to fiscal constraint is not entitled to backpay for period prior to actual appointment since employee had no vested right to appointment on the earlier date and agency did not exercise discretionary authority to appoint at that time. Employee's alternative claim for contractual delay damages is denied since an offer of public employment does not give rise to a contractual relationship in the conventional sense.

This decision is in response to a request from Mr. John R. McCauley for reconsideration of our Claims Division's settlement of May 4, 1979, by which his claim for backpay or, in the alternative, contractual delay damages was denied.

Mr. McCauley's claim is based on a 2 week delay in effecting his appointment as an attorney with the Department of Health, Education and Welfare (HEW) in Buffalo, New York. He states that the Hearing Administrator for Buffalo informed him by phone on September 23, 1977, and confirmed 3 days later that he had been selected for a permanent Attorney position at the GS-9 level effective October 11, 1977. Mr. McCauley claims that in reliance upon that telephone notification he terminated his attorney position in Detroit where he had been earning \$1000 a month. The Regional Personnel Officer, informed Mr. McCauley by a letter dated October 4, 1977, that he had been selected for the position but that due to fiscal restraints, he was unable to advise him of a reporting date. That letter is consistent with an HEW "hotline" memorandum of the same date advising all personnel officers of appointment procedures to be followed pending the then-delayed enactment of that Department's 1978 appropriation. The memo defines a "firm commitment" to mean that the Personnel Office has extended the offer of appointment after all necessary approvals have been obtained and states with respect to positions for which no firm commitment has been made that offers may be made but "no dates of entry on duty can be given." Mr. McCauley was ultimately appointed and began work on October 25, 1977.

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Mr. McCauley's claim for backpay covers the period from October 11, 1977, to the date of his appointment on October 25, 1977, as does his claim for contractual delay damages based on his loss of salary at the rate of \$1000 a month. Those claims were denied by the Regional Personnel Officer in a letter dated August 15, 1978. By the following statement from that letter, the Regional Personnel Officer explained to Mr. McCauley that the Hearing Administrator who had contacted him on August 23, 1977, did not have appointment authority:

"You state that on September 23, 1977, you had a phone conversation with Mr. Charles Allen, the Hearings Administrator in Buffalo, in which he verified your appointment as an attorney in Buffalo, effective October 11, 1977. Mr. Allen does not have appointing authority, that is -- authority to commit the agency to hiring. Exclusive appointing authority for the agency in Region II is held by me as DHEW Regional Personnel Officer. No written communication verifying an October 11, 1977 starting date was sent by me, by anyone on my staff or by anyone acting on my behalf.

"The first written communication in this regard that appears in our records is a letter from me, dated October 4, 1977, informing you that you were selected as an attorney to work in Buffalo. The letter stated - 'We are unable to advise you of a reporting date at this time due to fiscal constraints; however, you will be contacted by this office as soon as a reporting date can be established.'" (underlining supplied)

An offer of employment does not give rise to a contractual relationship in the conventional sense. Bers v. United States, 207 Ct. Cl. 941 (1975). For this reason, we find no basis to award Mr. McCauley the contractual delay damages claimed. His entitlement, if any, is governed by the Back Pay Act, 5 U.S.C. 5596 (1976), which provides a remedy for instances in which an employee is found to have undergone an unwarranted or unjustified personnel action which has resulted in the withdrawal or reduction of all or a part of his pay, allowances or differentials. Because the Back Pay Act applies only to employees, the instances in which initial appointments may be effected retroactively and backpay awarded are restricted to those in which an individual has a vested right to employment status by virtue of statute or regulation.
David R. Homan, B-195259, October 29, 1979.

We have also recognized that an individual who has been duly appointed to a Federal position but who is improperly restrained from entering upon the performance of his duties is entitled to redress under the Back Pay Act. Our holding in B-175373, April 21, 1972, involved an individual who was initially advised that he had been selected for a position. He was wrongly informed that the offer of employment was being withdrawn and, upon reporting for duty on the date originally set, he was improperly restrained from entering upon duty. Based on the Civil Service Commission's determination that the individual was legally appointed as of the date he attempted to enter on duty and that the agency's action in preventing his entrance on duty was tantamount to an erroneous removal or discharge, we held that he was entitled to backpay from the date he properly should have been permitted to enter on duty.

In contrast, in cases where the official with appointment authority has not exercised his discretion to appoint an individual to a Federal position, there is no basis to appoint retroactively, even where the delay is due to administrative error. The holding in Raymond J. DeLucia, B-191378, January 8, 1979, involved an applicant for a position as Deputy U.S. Marshal who was first notified of his selection and given a reporting date. Through administrative error he was inadvertently notified that the offer of employment was withdrawn and by the time the problem was resolved, his appointment had been delayed for almost 2 months. In holding that he was not entitled to backpay for that 2 month period prior to his actual appointment, we stated:

"* * * in the ordinary case the decision to appoint or promote an individual in the Federal service is left to the discretion of the employing agency, and we have held that in such case the agency's action in not hiring or promoting the individual on the date he expected or would have preferred, does not constitute an 'unjustified or unwarranted personnel action' under the Back Pay Act. This is so even though it appears that the appointment or promotion may have been delayed through error or an unusually heavy agency workload in the processing of personnel actions, since the employee in such case has no vested right under law or regulation to be appointed or promoted in any event. * * *"

Also see Leonard Ross, B-183440, August 12, 1975.

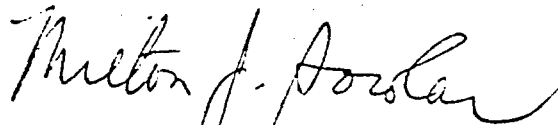
In Mr. McCauley's case, there is no indication that he had a vested right to appointment at any time or that his entrance on duty was erroneously or improperly delayed after the Regional Personnel Officer exercised his discretion to appoint. To the contrary, the record shows that the information that he was tentatively to report on October 11, 1977, was conveyed to him by an individual who did not have appointment authority. While Mr. McCauley apparently relied on this information, it is well settled that the Government cannot be bound by the erroneous acts of its officers, agents or employees. 53 Comp. Gen. 834 (1974). The Regional Personnel Officer's action in appointing Mr. McCauley at a later date was not only within his discretion, but consistent with HEW's stated policy of fiscal management in the face of a possible delay in the enactment of its appropriation. Under these circumstances, there is no basis to award Mr. McCauley backpay for the 2 week period prior to his actual appointment. It is immaterial that he terminated his previous employment on the basis of his expectation of an earlier appointment, since an employee's election to resign such prior employment cannot, as a matter of law, operate to deprive an agency of its discretionary authority to appoint. See B-191378, supra.

Finally, Mr. McCauley requests reimbursement under 5 U.S.C. 5723 of his airline fare for roundtrip travel from Detroit to New York where he claims he reported for work on October 11. He offers no explanation for this travel 4 days after he received the letter advising him that a reporting date could not be set. In his letter of August 15, 1977, the Regional Personnel Officer denied Mr. McCauley's claim for travel expenses stating that the trip was made without HEW's permission and was made to New York City, not Buffalo, the city in which he was being considered for employment.

Under 5 U.S.C. 5723 (1970) an agency, may pay travel expenses of "a new appointee * * * to a position in the United States for which the Civil Service Commission determines there is a manpower shortage * * *," even though the individual selected has not yet been appointed. There is nothing in the record to indicate that the position to which Mr. McCauley was appointed was designated as a manpower shortage category position. Even if the position was so designated, reimbursement under 5 U.S.C. 5723 is authorized only for travel to the employee's duty station, and only if payment of such expenses has been properly authorized or approved. See Gerald P. Delaney, B-186260, July 12, 1976. Thus, the travel expenses claimed may not be reimbursed.

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In accordance with the above, the settlement of our Claims Division is affirmed.

A handwritten signature in cursive script, reading "Milton J. Jordan". The signature is written in dark ink and is positioned above the typed name.

For the Comptroller General
of the United States