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**DECISION**



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

FILE: B-197884

DATE: July 15, 1980

MATTER OF: James L. Hancox - [Claim for Backpay]

- DIGEST:
1. Individual appointed by Air Force after determination by Merit Systems Protection Board that his reemployment rights were violated is not entitled to backpay for period prior to his actual appointment. He did not have a vested right to employment by virtue of statute or regulation and agency had discretion with request to filling position.
  2. General Accounting Office does not hold adversary hearings, but decides claims on basis of written record presented.

This decision is in response to a request from Mr. James L. Hancox for reconsideration of our Claims Division Settlement Certificate No. Z-2818918, of November 23, 1979, which denied his claim for backpay. The issue presented is whether an employee can be granted backpay for a period prior to his appointment after the Merit Systems Protection Board (MSPB) has decided that his employing agency improperly denied him reemployment priority list rights. For the following reasons, we hold that the employee is not entitled to backpay.

Mr. Hancox was employed by the Department of the Air Force, Whiteman Air Force Base, Missouri. He was advised that he would be separated in a reduction-in-force by March 30, 1977. In order not to be unemployed Mr. Hancox resigned February 14, 1977, to work in private industry. He subsequently appealed the reduction-in-force action to the Civil Service Commission but his appeal was denied. However, Mr. Hancox later appealed to the MSPB alleging a violation of his reemployment rights, and the appeal was upheld on January 19, 1979. Mr. Hancox was reemployed at the base on February 20, 1979. He has claimed a retroactive appointment with backpay for the period commencing with his resignation until the date he was reemployed.

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The Back Pay Act, 5 U.S.C. § 5596 (1976), is applicable only to employees and 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 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 a statute or a regulation. 54 Comp. Gen. 1028 (1975); B-158925, July 16, 1968.

We find no violation of a statute or a mandatory policy in this case. In fact, the case of David R. Homan, 59 Comp. Gen. 62 (1979), is apposite here. In the Homan case we held that an employee hired after a determination by the Civil Service Commission that he had been improperly denied consideration for a competitive position was not entitled to backpay for the period prior to his actual appointment. The individual did not have a vested right to the appointment by way of a statute or regulation and the Commission directed the employee's agency to regularize the appointment by one of three methods. The choice of which of the three to use was left to the agency's discretion.

In this case, the MSPB gave the agency two choices. The "Report of Compliance" section of the MSPB decision states that:

"The appropriate corrective action for a violation of reemployment priority list rights, as set forth in FPM, Chapter 330, Subchapter 2-8, is for the agency to correct the improper employment by one of the following actions:

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"(1) Separate the employee improperly employed after which it may fill the position by any means not restricted by the reemployment priority list; or

"(2) Without separating the employee improperly employed, appoint from the list all individuals whose reemployment priority was violated by the improper employment."

Thus, the agency was given the discretion to utilize one of two conditions. Had condition 1 been selected, the agency did not necessarily have to reemploy Mr. Hancox at all. However, the agency exercised its discretion, followed condition 2, and reemployed Mr. Hancox on February 20, 1979. This was all that it was required in its discretion to do. See John R. McCauley, B-195654, November 27, 1979; Raymond J. DeLucia, B-191378, January 8, 1979.

We note also that the MSPB is an appropriate authority under the Back Pay Act to determine that an unwarranted or unjustified personnel action justifying backpay has occurred. However, it did not consider Mr. Hancox's case under that Act; rather, it considered his case under the provisions of Part 330, Subpart B, Title 5, Code of Federal Regulations, concerning appointment from a reemployment priority list, and referred the case to the agency for exercise of its discretionary authority as to the remedy for the violation of Mr. Hancox's reemployment rights. Homan, supra.

Mr. Hancox has also requested a hearing. However, this Office does not hold adversary hearings, but decides cases on the basis of the written record presented. 4 C.F.R. § 31.7 (1979).

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Accordingly, the settlement of our Claims Division  
is sustained.

*Milton J. Fowler*

For the Comptroller General  
of the United States