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DECISION

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

FILE: B-205459 DATE: July 15, 1982

MATTER OF: John L. Gibson

DIGEST: 1. Under 5 U.S.C. § 5595(c), severance pay is computed on the basis of the rate of pay received immediately before an employee's separation. Thus, an employee whose temporary promotion to a higher position was terminated 1 day prior to the day of his separation from Government service is entitled to have his severance pay computed on the basis of the rate of pay received in his permanent position, not on the basis of the rate of pay received in his temporary promotion.

2. In accordance with 5 C.F.R. § 335.102(f)(1) an agency may terminate an employee's temporary promotion in its discretion at any time prior to the scheduled expiration date. Also, there is no requirement that the employee should receive express notice of the termination.

This is in response to a letter from the Assistant Secretary for Administration, Department of Commerce, requesting a decision whether Mr. John L. Gibson, a former employee of the Economic Development Administration, is entitled to receive severance pay computed on the basis of a temporary promotion to a higher position or on the basis of his permanent position. For the reasons set forth below, we conclude that the employee's severance pay should be computed on the basis of the lower rate of pay of his permanent position.

The record indicates that Mr. Gibson was separated from Government service on September 29, 1981, as a result of a reduction in force (RIF). It is undisputed that he is eligible to receive severance pay although the amount of severance pay due is at issue. Mr. Gibson contends that his severance pay should be computed on the basis of the pay of the GS-14 position to which he had been temporarily promoted. Mr. Gibson indicates that he had received that temporary promotion on March 23, 1980, which was subsequently extended for a period not

to exceed September 29, 1981. However, the Assistant Secretary argues that the employee's temporary promotion was terminated prior to his separation; that he was returned to his permanent position, GS-13; and that his severance pay should be computed on the basis of his permanent position and not on the basis of his temporary promotion. In this connection the Assistant Secretary states:

> "In accordance with 5 U.S.C. 5595(a)(2)(ii) and 5 CFR 550.701(b), severance pay is limited to employees serving under appointments without time limitations. It appears to be inconsistent to base that benefit on a temporary (i.e., time-limited) salary. * * * Further, an employee serving on a temporary promotion is on notice that he/she can and will be returned to his/her permanent grade and the step/salary he/she would have been receiving absent the temporary promotion (5 CFR 335.102(f)). Lastly, under RIF regulations (5 CFR 351.404(a)(2)) an individual must compete from his/her permanent position."

As the Assistant Secretary points out, severance pay is governed by 5 U.S.C. § 5595 (1976) and the implementing regulations, 5 C.F.R. § 550.701 et seq., promulgated by the Office of Personnel Management. Under the law and regulations, an employee who "is involuntarily separated from the service, not by removal for cause" and who "has been employed currently for a continuous period of at least 12 months" may be eligible for severance pay so long as he was serving under an appointment without a definite time limitation.

The restriction against paying severance pay to employees who have been serving under an appointment with a definite time limitation applies to appointments only. Since appointments and promotions are not synonymous, the restriction evidently was not intended to include temporary promotions, i.e., promotions not to exceed a certain date. Furthermore, the "time limitation" restriction governs the eligibility of employees to receive severance pay and does not apply to the computation of severance pay amounts. Since it does not appear that Mr. Gibson

was serving under an appointment with a definite time limitation, although his promotion was temporary, he is not ineligible for severance pay on that basis.

Once eligibility to receive severance pay has been found, as it has in this case, the amount of severance pay due must be computed in accordance with the formula prescribed at 5 U.S.C. § 5595(c):

> "Severance pay consists of--
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> "(1) a basic severance allowance computed on the basis of 1 week's basic pay at the rate received immediately before separation for each year of civilian service up to and including 10 years * * * and 2 weeks' basic pay at that rate for each year of civilian service beyond 10 years * * *." (Emphasis supplied.)

The applicable regulation, 5 C.F.R. § 550.703(b), states:

> "'Basic pay' means the rate of pay fixed by law or administrative action for the position held by an employee at the time of separation * * *." (Emphasis supplied.)

Thus, an employee whose temporary promotion ends at any time prior to his separation must have his severance pay computed on the basis of the rate of pay in his permanent position.

The Assistant Secretary does note that there is a difference between the language of the cited statute and the language of the cited regulation. In our view, however, for ascertaining the rate of basic pay to be used in computing the severance pay there is no difference between the term "immediately before separation," as stated in the statute and the term "at the time of separation," as phrased in the regulation. That is, under either phrase the rate to be used is the last rate of pay to which the employee was entitled.

According to the agency, Mr. Gibson's temporary promotion to GS-14, step 4, was terminated effective September 28, 1981, 1 day prior to his separation. If this termination was legally and properly effected, Mr. Gibson's basic rate of pay "immediately before his separation," on September 29, 1981, was that of a GS-13, step 7--$38,456 per year. However, if the termination of his temporary promotion was not legally or properly effected his basic rate of pay remained that of a GS-14, step 4--$41,657 per year.

Mr. Gibson contends that the termination of his temporary promotion was performed improperly for several reasons and, therefore, should have no effect in the computation of his severance pay. In this regard, he says:

> "The Agency contends now that my temporary promotion was terminated on September 28, 1981, the day before the effective date of the RIF. I received no notice of such termination, oral, written, or otherwise, and I continued, in the presence of the Regional Director and five of my subordinates, to function at the higher level on September 29, 1981, the date of my separation. * * * The rate of pay I received until the last day of my employment was $41,657 per year * * *." (Emphasis supplied.)

In our opinion, the agency terminated Mr. Gibson's temporary promotion, notwithstanding his assertions to the contrary. The record shows that on September 25, 1981, the agency executed a Personnel Action (SF-50) terminating Mr. Gibson's temporary promotion, effective September 28, 1981. This action was consistent with 5 C.F.R. § 335.102(f)(1) which states that temporary promotions may be ended and the employee returned to his permanent position at any time in the discretion of the agency. Moreover, we have held that express notice of a termination is not required. Allan S. Danoff, B-198142.2, February 24, 1982.

Although, as he asserts, Mr. Gibson may have continued to perform the same duties he performed as a

GS-14 for the entire day following the termination of his temporary promotion and prior to his separation, this does not alter our view of the facts. The most the agency's action in terminating the temporary promotion, without changing his duties, would have done was to transform the temporary promotion into a detail to a higher grade position, effective September 28, 1981. That would not entitle Mr. Gibson to the higher salary for that day.

Finally, information we received from the agency has revealed that, contrary to Mr. Gibson's allegations, his pay was reduced to accurately reflect the termination of his temporary promotion. While there was some delay in this payroll action so that it did not occur in the first pay period following the termination, it did occur in due course. In any event, the facts that Mr. Gibson may have been erroneously overpaid, or that, unfortunately, he may not have received prompt notification of the termination of his promotion, do not change the fact that he was legally entitled to only the lower GS-13 salary.

Since it appears that the agency terminated the employee's temporary promotion, and since the employee was serving in his permanent position at the time of his separation, we hold that the employee's severance pay should be computed on the basis of the GS-13 rate of pay received in his permanent position.

for Milton J. Socolar
Comptroller General
of the United States