

25340

DECISION



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

FILE: B-210232

DATE: June 3, 1983

MATTER OF: HUD Employees - Severance Pay - Retroactive
Reduction-in-Force

DIGEST:

1. Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. § 5533(a).

2. Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be actually separated from United States Government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board.

Ms. Deborah S. DuSault, Director, Personnel Systems and Payroll Division, Department of Housing and Urban

025771

Development (HUD), has requested an advance decision under our procedures for labor-management relations cases found at ~~4 C.F.R.~~ Part 22 (1983). The interested parties were served with copies of that request in accordance with those regulations. The American Federation of Government Employees (AFGE) submitted a response. In reaching our decision, we have considered all materials provided to us.

This request concerns the entitlement to severance pay of certain former HUD employees whose employment was terminated by a reduction-in-force (RIF), after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued in a pay status and performed their normal duties with HUD. After the injunction was lifted, HUD made the RIF retroactively effective. The essential issues before us are whether the employees are entitled to severance pay, and if they are, in what amounts and when should the payments begin. For the reasons set forth below, we hold that the employees are entitled to receive severance pay, with the payments beginning following their actual separation on December 10, 1982, based upon their years of service and pay rates as of the date of the retroactively effective RIF.

On August 20, 1982, HUD issued a general RIF notice. Specific RIF notices were issued September 29, 1982, with an effective date of October 31, 1982. However, on October 29, 1982, the United States District Court for the District of Columbia, in American Federation of Government Employees, v. Pierce, Civil Action No. 82-3111 (D.D.C. 1982), granted a temporary restraining order staying the RIF. This was followed on November 15, 1982, by the issuance of a permanent injunction in the same action. The court's order was based on language prohibiting the use of appropriated funds for certain reorganizations within HUD prior to January 1, 1983, without the approval of the Committees on Appropriations. Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1983, Pub. L. 97-272, September 30, 1982, 96 Stat. 1160, 1164. This injunction was reversed by the United States Court of Appeals for the District of Columbia Circuit on December 8, 1982, holding that the basis for the permanent injunction, the restriction on the use of appropriated funds, was, in fact, an unconstitutional legislative veto. American Federation of Government Employees, v. Pierce, No. 82-2372 (D.C. Cir. 1982).

On December 9, 1982, HUD notified the affected employees that they would be separated at the close of business on December 10, 1982. The separations were made retroactively effective to October 31, 1982. We have been informed by HUD officials that if the separations had not been made retroactively effective, the retention status, under 5 C.F.R. Part 351, Subpart E (1982), of some affected employees would have changed, necessitating the separation of some different employees in place of some of those originally given RIF notices. It is contended that this would result in the injunction creating new rights, which HUD views as being prohibited by Pauls v. Seamans, 468 F.2d 361 (1st Cir. 1972).

We have not been asked to--and will not--decide the issue of the propriety of retroactively effecting the RIF. We have been informed that that issue is currently before the Merit Systems Protection Board (MSPB) for decision, the proper forum for consideration of the issue. Instead, we will assume--without deciding--that the retroactive RIF was proper, so that we may answer the questions asked. The AFGE submission contests the propriety of the RIF. Since we are not considering that issue, we will not discuss AFGE's position on the issue.

During the period that the RIF was stayed by the court, the affected employees continued their employment. The agency contends that these employees were "de facto" employees who are entitled to pay, but not creditable service. In support of this position, they cite our decision Victor M. Valdez, Jr., 58 Comp. Gen. 734 (1979), analogizing this situation to that of a person who serves after his appointment expires.

Specifically, the agency poses these two questions:

- "1. If the severance pay is effective on November 1, 1982, can the Department legally pay the severance pay in light of the dual compensation restrictions?
- "2. If the agency is precluded from paying severance pay until December 11, 1982, is the employee entitled to severance pay that would have been received during the 6-week injunction period,

November 1, through December 10, 1982,
or would the employee forfeit 6 weeks of
severance pay?"

DUAL PAY PROHIBITION

The first issue is whether the prohibition on pay from more than one position contained in 5 U.S.C. § 5533(a) (1976) prohibits the payment of severance pay under 5 U.S.C. § 5595 (1976) to the affected HUD employees. Under section 5595, an employee employed currently for a continuous period of at least 12 months who has been involuntarily separated--not by removal for cause on charges of misconduct, delinquency, or inefficiency--is entitled to be paid severance pay. Under section 5533(a), an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week.

Under section 5533(a), the prohibition is on "basic pay" from more than one position. The implementing regulations for section 5533 define "pay" as, "pay paid for services." 5 C.F.R. § 550.502(b) (1982). We view severance pay as a benefit paid upon involuntary separation, rather than as "pay paid for services." The involuntary separation--not the provision of services--gives rise to the entitlement to severance pay. This view is reinforced by subsection 5595(f), which provides that severance pay under that section is not a basis for the computation or payment of any other type of Government benefit, and a period covered by severance pay is not a period of United States Government service. Therefore, section 5533(a) has no application to the receipt of severance pay. The prohibition on dual pay from more than one position contained in section 5533(a) does not prohibit the payment of severance pay under section 5595 in this case.

WHEN SEVERANCE PAY ENTITLEMENT BEGINS

The second issue is whether severance pay should be paid to the employees during the period that the RIF was stayed by the court, while they continued their employment.

We view severance pay as being incompatible with pay for services rendered. In our decision B-178446, May 4, 1973, we stated that in order for an individual to receive severance pay, he must be separated from the United States Government service. The agency contends that those HUD

employees should be treated as if they had actually been separated on the originally planned date of separation, not on the date of actual separation following the lifting of the injunction. The agency relies upon Pauls v. Seamans, cited above, which prohibits the acquisition of rights through an injunction that is eventually lifted. That case was based on the theory that an injunction is intended to maintain the status quo ante. During the period that the RIF was stayed by the court, and the affected employees continued their employment, the agency believes these employees were "de facto" employees who were entitled to pay, but not creditable service. They rely upon our decision in Valdez, cited above, analogizing this situation to that of a person who serves after his appointment has ended. Such a person does not satisfy the definition of an "employee" in 5 U.S.C. § 2105 (Supp. IV 1980), as an individual who is appointed in the civil service by a designated official. It is AFGE's contention that the affected employees remained "employees" under section 2105 until the day they were actually separated, December 10, 1982.

Whether the affected employees were "de facto" employees, or employees under section 2105, is not relevant to this decision. The employees' status during the period of the injunction will depend upon whether the MSPB upholds the retroactive effective date of the RIF. For purposes of severance pay, since we have already held that the payment of severance pay cannot begin until an employee is actually separated, no entitlement to severance pay exists until the employee actually leaves the payroll. Thus, for these employees, until they were actually separated on December 10, 1982, there was no entitlement to severance pay. Just as the RIF was stayed by the court's order, so was the employees' entitlement to severance pay. Therefore, beginning on December 10, 1982, the employees who were separated in the RIF are entitled to receive severance pay. Since we have assumed--without deciding--for purposes of this decision that the retroactive RIF was proper, we believe that the amount of severance pay and the period of entitlement to severance pay should be the same as if the employees had been separated on October 31, 1982, as originally intended by HUD.

Accordingly, the affected individuals' rights to section 5595 severance pay should be treated as starting on the day that they were actually separated--December 10, 1982, but with the amount of severance pay computed on the

B-210232

basis of each such individual's pay rate and years of service as of the date the RIF would have gone into effect had there been no injunction--October 31, 1982. If the Merit Systems Protection Board decides that the RIF should not have been retroactively effected, then the changes in pay rate and time of service during the period of the injunction should be included in computing their severance pay entitlement.

for Milton J. Aowlan
Comptroller General
of the United States