



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Joseph B. Riego, Sr., Reconsideration

File: B-217044

Date: November 28, 1986

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### DIGEST

The denial of a former Federal employee's claim for additional backpay because of a procedurally defective removal from a position is affirmed since the employee has not met his burden of demonstrating that the original decision should be reversed due to an error of law or fact. The employee was removed from a position reserved for local nationals in the Philippines after he became a U.S. citizen. He moved to the U.S.A. less than 3 months later. The Merit Systems Protection Board determined that he should have been provided with a 60-day notice period under reduction-in-force procedures prior to his removal, and he was awarded backpay on that basis. The case record demonstrates that additional backpay is not warranted because of several factors, including the fact that the employee was not available for work and, moreover, there was no position for which he qualified as a U.S. citizen even if he had been available.

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### DECISION

Mr. Joseph B. Riego, Sr., requests reconsideration of our decision, Joseph B. Riego, Sr., B-217044, December 11, 1985, in which we denied his claim for additional backpay believed due because of purported improprieties relating to his separation from employment in the Republic of the Philippines with the Department of the Navy in 1974. We affirm our previous decision to deny Mr. Riego additional backpay.

### BACKGROUND

Since in our decision Joseph B. Riego, Sr., B-217044, December 11, 1985, we discussed in detail the background of this case, we will reiterate only those facts necessary to resolve this request for reconsideration. In April 1974 Mr. Riego was a civilian employee of the U.S. Navy at Subic Bay, Republic of the Philippines, in a position reserved for Philippine nationals. When he obtained U.S. citizenship on

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April 30, 1974, he was separated and paid 20 months of severance pay. In the summer of 1974, he moved to the United States where it appears that except for two limited periods of time he has resided and been employed ever since.

In January 1979, Mr. Riego appealed his separation to the Merit Systems Protection Board (MSPB). On December 12, 1980, the MSPB concluded that, notwithstanding the Navy's argument that it had no position available to a U.S. citizen for which Mr. Riego could have qualified, the Navy had not followed required reduction-in-force (RIF) procedures in its termination of Mr. Riego. Consequently, in an attempt to comply with the MSPB decision, the Navy retroactively reinstated Mr. Riego effective April 30, 1974, for 60 days, the required notice period before an employee would be separated for a RIF. Mr. Riego, therefore received 60 days' backpay.

Subsequently, Mr. Riego filed a claim with our Claims Group alleging entitlement to backpay from April 30, 1974, until such time as he might be "physically" restored to the rolls following the 1980 MSPB decision. Our Claims Group denied the claim. Mr. Riego then initiated further proceedings before the MSPB which held on April 15, 1983, that he was entitled to current reinstatement and to an opportunity to make a claim for backpay. In so doing the MSPB acknowledged the Navy's argument that Mr. Riego could not receive more than 60 days of backpay since his acceptance of U.S. citizenship was conditional on his promise to emigrate to the United States, making him unavailable for duty in the Philippines. Nevertheless the MSPB ordered Mr. Riego currently reinstated so that he could make a claim for backpay under the Back Pay Act. In so doing the MSPB indicated that its decision directing current reinstatement was consistent with the decision issued on June 5, 1975, by the San Francisco Office of the Federal Employee Appeals Authority in regard to another case, that of a Mr. Florentino Ignacio. The MSPB, however, stressed that any decision regarding entitlement to backpay was for determination by the Navy and our Office.

In an attempt to comply with this MSPB decision, the Navy reinstated Mr. Riego as of May 10, 1983, and paid him as if he were on annual leave. The Navy went through the RIF procedures and terminated him on August 16, 1983. He was placed on annual leave status rather than being required to report for work since he was then living in California. The Navy then forwarded the claim for additional backpay between 1974 and 1983 to our Claims Group which disallowed it.

In our December 12, 1985 decision we likewise denied Mr. Riego any further award of backpay. As we pointed out, under the Back Pay Act, 5 U.S.C. § 5596, an employee may not recover backpay for periods when he or she is unavailable for performing the duties of his or her position. See Kenneth L. Clark, 62 Comp. Gen. 370 (1983), 5 C.F.R. § 550.805(b) and (c). In this regard the Navy indicated that Mr. Riego knew that his employment would be terminated upon his obtaining U.S. citizenship. Also, in his application for citizenship he stated his intent to emigrate to the United States and he did emigrate soon after his separation. Thus, shortly after obtaining U.S. citizenship he was unavailable for performing work in the Philippines. Moreover, even had he been available for work, the Navy states that he would have received pay only for the 60-day notice period incident to a RIF since there were no positions available for which he, as a U.S. citizen, could have qualified.

In his request for reconsideration, Mr. Riego states that our decision is not in accord with the MSPB decision of April 15, 1983. He also seems to suggest that the Navy did not treat him in the same manner as it treated Mr. Ignacio. Additionally, he questions the determination regarding his being unavailable for duty. Specifically, he points out that during the entire time between 1974 and 1983, he was never contacted as to his availability for employment. Furthermore, he alleges that following the December 1980 decision, he returned to Subic Bay for 5 months and only returned to the United States because he received no responses from the Navy to his inquiries. Again in 1983, following the second MSPB decision he returned to Subic Bay without receiving any notice from the Navy.

In any request for reconsideration of a decision of our Office the burden is on the claimant to identify the errors of fact or law believed to have been committed in that decision with some particularity so as to enable us to determine the basis of the request. See generally Philip M. Napier, B-216938, November 12, 1985. Although Mr. Riego alleges our decision conflicts with the MSPB adjudication of April 15, 1983, he does not tell us what this conflict is. Likewise he does not give us any details as to how his treatment differed from Mr. Ignacio and what the detriment is he thereby suffered.

Nevertheless, while we cannot respond specifically to Mr. Riego's allegations due to their vagueness, we can respond generally and in a manner we consider to be

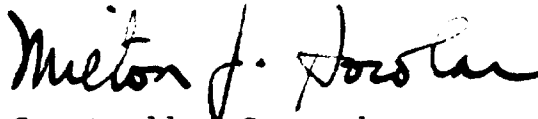
dispositive of those issues. Mr. Riego is disputing our denying him additional backpay. As the MSPB recognized in its decision such a matter is eventually for us to decide. Therefore, our decision cannot be inconsistent with the MSPB decision since the MSPB decision specifically reserved this issue of backpay for us. Moreover, it would not be a proper basis to allow Mr. Riego additional amounts simply because Mr. Ignacio may have been given more than 60 days' backpay. It is to be emphasized, however, that nowhere in the record before us is there an indication that Mr. Ignacio did receive a backpay award significantly different from that received by Mr. Riego, nor have the circumstances of Mr. Ignacio's case been presented in any detail.

As to Mr. Riego's contention that he was available for work during the entire period from 1974 to 1983 because he did return to the Philippines in 1981 and 1983, following the MSPB decisions, we do not agree. For example, the fact that he may have returned to the Philippines in 1981 is not probative of whether he was available for work between 1974 and 1980. A more important point, and one which Mr. Riego has not addressed, is that availability alone would not mandate that he receive additional backpay. Even if he were available, there must be a position for which he qualified as a U.S. citizen. As we noted in our earlier decision:

"In addition, the Navy states that the only pay Mr. Riego would have received but for his procedurally defective separation, was that payable during the 60-day notice period, since there was no position available for which he could have qualified as a U.S. citizen." (Emphasis added.)

Thus, to recover additional backpay Mr. Riego must not only be available but he must also be available for a position for which he qualified as a U.S. citizen. The Navy states there was no such position.

Accordingly, we affirm our previous denial of Mr. Riego's claim for backpay.



Acting Comptroller General  
of the United States