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DECISION

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

FILE: B-217050 **DATE:** July 30, 1986

MATTER OF: Sylvia J. Eastman and Ann H. Meadows - Severance Pay - Temporary Agencies

DIGEST:

Severance pay statute, 5 U.S.C. § 5595, is intended to provide a cushion for federal employees who are unexpectedly terminated from their positions, but not for those employees who had an expectation of separation at the time of their appointments. Consistent with this intent, a regulation, 5 C.F.R. § 550.704(b)(4)(iii), which denies severance pay to employees of agencies scheduled to expire within 5 years of the employee's date of appointment is valid as applied to agencies which perform an inherently temporary mission and have not been extended. However, the regulation cannot properly be applied to the United States Commission on Civil Rights, which, while literally covered by the regulation, had been in continuous existence for over 20 years at the time the employees seeking severence pay were appointed. Such employees are within the zone of protection intended by the statute since they cannot reasonably be viewed as having an expectation of separation at the time they were appointed. Frances (Goldberg) Zucker, B-188819, February 8, 1978, distinguished.

This decision is in response to claims for severance pay submitted to our Claims Group by two former employees of the United States Commission on Civil Rights, Ms. Sylvia J. Eastman and Ms. Anne H. Meadows. For the reasons stated hereafter, we conclude that the claimants are eligible for severance pay.

BACKGROUND

On November 16, 1983, Ms. Eastman and Ms. Meadows resigned from their positions with the Civil Rights Commission, "in lieu of other involuntary action," incident to the projected expiration and shut-down of the Commission

on November 30, 1983. At the time of their resignations, Ms. Eastman had served with the Commission for 4 years and 9 months and Ms. Meadows had served for 4 years and 1 month.

Shortly before their resignations they had been informally advised of their entitlement to severance pay. On November 23, 1983, however, they were officially informed that they were ineligible for severance pay because of 5 C.F.R. § 550.704(b)(4)(iii). This regulation precludes severance pay for employees of agencies which are scheduled to terminate within 5 years of the date of the employee's appointment and which have not been extended beyond 5 years of such date by the time of the employee's separation.

Among their other contentions, the claimants assert that the regulation is illegal because it imposes a condition upon eligibility for severance pay beyond those set forth in or contemplated by the severance pay statute. In the alternative, they maintain that the regulation is inapplicable to the Civil Rights Commission, which had been in continuous existence for well over 20 years at the time of their resignations, by virtue of a series of congressional reauthorizations. Their argument on this point is that the regulation was designed to make employees of certain temporary agencies ineligible for severance pay but that the Civil Rights Commission cannot reasonably be considered a temporary agency for this purpose.

DECISION

Consistent with a prior decision of our Office, we believe that the severance pay statute affords sufficient administrative discretion to support a regulation which excludes from severance pay coverage employees of clearly temporary agencies. Nevertheless, we agree with the claimants that the Civil Rights Commission is not such an agency and, therefore, the regulation cannot properly be applied to the Commission.

The statute governing severance pay is 5 U.S.C. § 5595 (1982). Subsection 5595(b) provides:

> "Under regulations prescribed by the President or such officer or agency as he may designate, an employee who--

> "(1) has been employed currently for a continuous period of at least 12 months; and
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> "(2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;
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> is entitled to be paid severance pay in regular pay periods by the agency from which separated."

While the term "employee" is defined generally in subsection 5595(a)(2) to mean an individual who is employed in or under an agency, this subsection goes on to qualify the definition of "employee" by excluding a number of classes of individuals from coverage. One of these exclusions is 5 U.S.C. § 5595(a)(2)(ii), which provides that the definition of "employee" does not include:

> "an employee serving under an appointment with a definite time limitation, except one so appointed for full-time employment without a break in service of more than 3 days following service under an appointment without time limitation * * *."

The President delegated to the Civil Service Commission, now the Office of Personnel Management (OPM), authority to prescribe regulations implementing 5 U.S.C. § 5595. One provision of these implementing regulations, and the provision at issue here, is 5 C.F.R. § 550.704(b)(4)(iii) (1986),[1/] which states:

> "An employee is considered to be serving under an appointment with a definite time limitation for purposes of section 5595(a)(2)(ii) of [title 5] when (a) he accepts an appointment without time limitation in an agency which is scheduled

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[1/] The language of this provision has remained unchanged at all times relevant to the present case.

> by law or Executive order to be terminated within 5 years of the date of his appointment, and (b) the scheduled date of termination for the agency has not been extended beyond 5 years of the date of appointment at the time of the employee's separation."

As noted previously, the claimants in the present case first contend that the above-quoted regulation is illegal because it imposes an unauthorized condition on eligibility for severance pay. They maintain that while 5 U.S.C. § 55595(a)(2)(ii) limits severance pay coverage for temporary employees, it affords no basis to exclude permanent employees of temporary agencies.

We considered this issue in our decision Frances (Goldberg) Zucker, B-188819, February 8, 1978, and sustained the legality of 5 C.F.R. § 550.704(b)(4)(iii). The Zucker decision addressed a claim for severance pay by an employee of the American Revolution Bicentennial Administration. Our decision quoted from and relied heavily upon a justification for the regulation provided by the Director of the then Civil Service Commission as follows:

> "Severance pay is viewed as a cushion for employees unexpectedly terminated from their positions because of changing program demands or increases in efficiency resulting in reduced need for the employees' services. When Congress passed PL 89-201 authorizing severance pay, they provided that certain employees, among them employees serving in appointments with a definite time limitation, would not be eligible for severance pay because at the time of appointment there was an expectation of separation. Under its delegated authority, and in line with the intent of the law, the Commission expanded this concept to exclude from eligibility for severance pay those employees who accepted appointment in an agency which was scheduled to terminate within five years from the date of the employee's appointment

(5 C.F.R. § 550.704(b)(4)(iii)). In approving this change in the severance pay regulation it was noted at the time that in substance there is no difference between an employee accepting an appointment under such circumstances in an agency with a definite termination date and an employee accepting an appointment with a definite time limitation--both employees know when they accept their appointment that they will be separated by a certain date." (Emphasis in original.)

In Zucker we found no reason to disagree with the justification for 5 C.F.R. § 550.704(b)(4)(iii) advanced by the Civil Service Commission. We pointed out in the context of the facts of that case:

"At the time the employee accepted an appointment with ARBA [the American Revolution Bicentennial Administration], April 21, 1975, the activity had a termination date established by statute of less than 5 years, June 30, 1977. The very nature of the ARBA connoted an activity with a limited function and life span. Since the employee was aware at the time of her appointment of the temporary nature of the activity, separation should not be unexpected. The fact that separation may occur sooner than anticipated or that the employee may not have been informed of her ineligibility for severance pay, does not change the requirement of the law and regulation. * * *

"* * * To authorize severance pay in such a case would violate the spirit of the law and the regulation that severance pay be provided only for employees who are terminated unexpectedly, and would negate the intent of Congress in excepting employees with appointments of limited duration from the provisions of the law." (Emphasis supplied.)

The Civil Service Commission's justification for 5 C.F.R. § 550.704(b)(4)(iii) and our acceptance of that justification in Zucker thus are based on the rationale that employees of certain temporary agencies, as defined in the regulation, have an "expectation of separation." Therefore, their status is analogous to temporary employees who were excluded by 5 U.S.C. § 5595(a)(2)(ii) from coverage based on a congressional intent to provide severance pay as a cushion only for employees suffering unexpected termination.

As we held in Zucker, this rationale is reasonable in the case of an agency such as the American Revolution Bicentennial Administration which had an inherently temporary mission, performed that mission, and then ceased to exist. But can it be sustained in the case of the Civil Rights Commission, which does not have an inherently temporary mission and which has been extended by Congress many times?

The Commission was originally established by Part I of the Civil Rights Act of 1957, Pub. L. No. 85-315 (September 9, 1957), 71 Stat. 634. Section 104 of the Act, 71 Stat. 635, charged the Commission with (1) investigating allegations that United States citizens were being denied the right to vote by reason of their color, race, religion or national origin; (2) studying and collecting information concerning legal developments constituting a denial of equal protection; and (3) appraising federal laws and policies with respect to equal protection. Section 104 of the 1957 Act required the Commission to submit a final report not later than 2 years from the date of enactment of that Act, and further provided that the Commission "shall cease to exist" 60 days after the submission of its final report.

Congress amended the Commission's statutory charter a number of times after 1957. These amendments not only consistently extended the Commission's life but also expanded its functions on several occasions.[2]/ When the

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[2]/ See generally 42 U.S.C. § 1975c (1982) and the notes of amendments following it for a summary of the evolution of section 104 of the 1957 Act.

claimants in this case were hired by the Commission, it had been in continuous existence for about 22 years, having been extended by Congress 7 times (1959, 1961, 1963, 1964, 1967, 1972 and 1978). Section 104 of the Act, as amended in 1978, required the Commission to submit its final report by the last day of the fiscal year ending on September 30, 1983, and provided that the Commission would cease to exist 60 days after that date. See 42 U.S.C. § 1975c(c) and (d) (1982).3/

The claimants in this case are covered by the literal terms of 5 C.F.R. § 550.704(b)(4)(iii) since, at the time they accepted their appointments, the Civil Rights Commission was scheduled to terminate within 5 years and since the Commission was not extended beyond 5 years of that date at the time the claimants left. Given the background of the Commission as discussed above, however, the real issue is whether this regulation may be applied to the Commission consistent with the purpose and intent of the severance pay statute. As the Claims Court observed in a recent decision addressing the severance pay statute:

> "* * * the long-standing consistent interpretation of a statute manifested by regulations promulgated by the agency charged with implementing it is due significant deference. * * * But this axiom is tempered by the admonition that a regulation which is clearly incompatible with the statute under which is was ostensibly promulgated must give way. * * *" Sullivan v. United States, 4 Ct. Cl. 70, 73 (1983), aff'd, 742 F.2d 628 (Fed. Cir. 1984).

3/ On November 30, 1983, the "United States Commission on Civil Rights Act of 1983" was enacted. Pub. L. No. 98-183 (November 30, 1983), 97 Stat. 1301, 42 U.S.C. §§ 1975-1975f (Supp. II, 1984). This Act reconstituted the Commission with a 6-year life span. Section 6 of the Act, 42 U.S.C. § 1975d(a)(2) (Supp. II, 1984), preserved the status and continuity of service of Commission employees, with the exception of the former staff director and former Commission members.

We sought the views of OPM on this issue, but we were unable to obtain a response. Given the absence of any elaboration by OPM, we must decide the issue based on the rationale for the regulation provided to us in connection with the Zucker decision. In this regard, we do not think it is plausible to treat the claimants in this case as having an expectation of separation at the time they joined the Civil Rights Commission. Instead, the background and evolution of the Commission require a conclusion that the claimants reasonably could have expected the Commission's authorization to be extended beyond its termination date at the time of their appointments. Thus, we believe that they are within the category of employees which Congress intended to protect under the severance pay statute.

Absent a response from OPM to our inquiry, we do not know whether OPM would apply 5 C.F.R. § 550.704(b)(4)(iii) to the Civil Rights Commission and, if so, how it would justify that result in terms of its stated rationale for the regulation or the intent of the severance pay statute. In any event, without a compelling justification by OPM, we must hold that 5 C.F.R. § 550.704(b)(4)(iii) cannot be applied to divest the claimants here of severance pay. Accordingly, their claims should be granted if otherwise correct.

Milton J. Socolar

for Comptroller General
of the United States