

*Hitzman*



**The Comptroller General  
of the United States**

Washington, D.C. 20548

**Decision**

**Matter of:** Raymond W. Leone - Request for Backpay  
**File:** B-222379  
**Date:** April 10, 1987

**DIGEST**

1. This Office will not inquire into matters relative to a grievance since such matters are within the jurisdiction of the employing agency and the Office of Personnel Management. However, if an employee is found to have undergone an unjustified or unwarranted personnel action, we will authorize the payment of backpay under the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1982).

2. Army civilian employee is not entitled to backpay and substitution of sick leave for leave without pay on the sole basis of a favorable grievance examiner's recommendation. The recommendation was denied at a higher level, and the failure of Army officials to forward the recommendation within 8 days as prescribed by agency regulations does not take away the agency's discretionary authority to deny a recommendation since the timeframes are only procedural guidelines.

**DECISION**

**BACKGROUND**

Mr. Raymond W. Leone, an employee of the Department of the Army, has appealed the determination by our Claims Group in its settlement Z-2844297, February 21, 1986, which denied his claim for backpay and substitution of sick leave for leave without pay (LWOP). For the reasons that follow, we uphold our Claims Group's determination.

Mr. Leone is currently employed by the Department of the Army, Fort McPherson, Georgia, and was formerly employed by the Department of Army in Europe. It was during this period of his employment in Europe that the present claim arose. In January 1981, Mr. Leone accepted a reassignment to another Army organization within Europe. A replacement was recruited

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for his old position, and after his position had been committed, Mr. Leone submitted his resignation with an effective date of April 10, 1981. He was later granted an extension of his resignation date by the Army to April 24, 1981. Before the effective date of his resignation, Mr. Leone accepted a position with the Army in Fort Hood, Texas, and he attempted to cancel his impending resignation. The Army denied his request on the basis that the position was committed to a replacement, and the Army placed Mr. Leone on LWOP so that he would not have a break in service prior to his reporting to Fort Hood in June 1981. Mr. Leone also applied for sick leave during the period he was on LWOP, but his request was denied by the Army on the basis that it would require a retroactive conversion of his LWOP to sick leave.

Mr. Leone filed a formal grievance on August 9, 1981, in which he alleged that the Army refused to accept cancellation of his resignation, that he was coerced into taking leave without pay, and that he was denied a request to substitute sick leave for LWOP. The period of his claim is from April 25 through June 7, 1981, and he is asking for backpay and applicable cost of living and housing allowances, as well as substitution of sick leave.

The United States Army Civilian Appellate Review Agency (USACARA) found that Mr. Leone voluntarily chose to resign without any coercion. However, the USACARA grievance examiner recommended, for various reasons, that Mr. Leone be granted the relief he was seeking. Mr. Leone's activity commander rejected the USACARA grievance examiner's recommendation on April 13, 1982. The activity commander's decision was later upheld by Headquarters, United States Army Europe and Seventh Army, on August 2, 1982.<sup>1/</sup>

Mr. Leone has continued to pursue his claim over the years<sup>2/</sup> and filed a request with this Office to order the Army to award him backpay for an unjustified personnel action under the provisions of 5 U.S.C. § 5596 (1982). Our Claims Group issued a settlement certificate on February 21, 1986, denying

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<sup>1/</sup> Although the record in this case is substantial, the final denial of the grievance is not contained in the record.

<sup>2/</sup> Several petitions to the Merit Systems Protection Board were denied on the basis of lack of jurisdiction. MSPB Docket No. DC 07528510353, October 31, 1985; MSPB Case No. DC 07528211402, November 9, 1982.

Mr. Leone's request on the basis that this Office does not have jurisdiction to review allegations of irregularities in agency grievance procedures.

#### OPINION

Mr. Leone bases his request for reconsideration on the Army Civilian Personnel Regulations (CPR) pertaining to grievance procedures. He contends that such regulations are mandatory in effect and that because the Army failed to transmit the USACARA grievance examiner's recommendation to the next command level within 8 days, as prescribed by CPR 771.3-13, the recommendation became final. He states that agencies are not free to ignore their own regulations, and he cites to the case of Spann v. McKenna, 615 F.2d 137 (3rd Cir. 1980), as authority for this argument. Hence, he states that he is entitled to backpay under the provisions of 5 U.S.C. § 5596 (1982), and that we should order the Army to comply with its regulations.

The General Accounting Office will not inquire into matters relative to a grievance. Such matters are within the jurisdiction of the employing agency and the Office of Personnel Management (OPM). Samuel H. Stern, B-202098, April 22, 1982, Donald J. Tate, B-203622, January 19, 1982, and 5 C.F.R. § 771.304 (1986). This Office will, however, award backpay under the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1982), if an employee is found to have undergone an unjustified or unwarranted personnel action. An unjustified or unwarranted personnel action is defined in 5 C.F.R. § 550.803 (1986), and refers to the violation of a "regulation or mandatory personnel policy."

In addressing the issue as to whether the Army violated a nondiscretionary administrative regulation in not forwarding the USACARA grievance examiner's recommendation to the next command level within 8 days, we do not regard this regulatory provision as being absolute or nondiscretionary in nature. The regulation merely provides procedural guidelines for the Army to follow in processing grievances. This conclusion is substantiated by the fact that the regulation does not provide for any specific remedy or penalty in those circumstances where the 8-day period is exceeded. In fact, the regulation contains many other suggested guidelines that were not adhered to in this case, including Mr. Leone's failure to submit a formal grievance within 5 days after

completion of informal proceedings. CPR 771.3-4a(2). Although the USACARA grievance examiner held that extenuating circumstances prevented Mr. Leone from filing a timely response, nevertheless the submission did not conform to regulatory guidelines. We also note that the USACARA's investigation took 7 months to complete and was therefore not completed within the 35-day period prescribed in CPR 771.3-4a(4).

Mr. Leone also alleges that regulations pertaining to grievances as published by OPM in the Federal Personnel Manual likewise have a mandatory effect. However, we would point out that OPM's role in this area is to review agency grievance systems and see that they are in compliance with published guidelines. See 5 C.F.R. § 771.304 (1986). In fact, OPM originally published a suggested 90-day time limit for completion of grievances. 5 C.F.R. § 771.110 (1975). Such provision is no longer published in the Code of Federal Regulations, and we have held that such provision was merely a guideline. Stern, supra at page 6.

Mr. Leone also cites to the case of Spann v. McKenna, cited above, in support of his contention that the Army must comply with its own grievance procedures. However, we believe the Spann case does not compel that result. In Spann a civilian employee of the Army transferred between two positions at the same grade level. The appointment to the new position was cancelled, and the employee was reappointed to his former position without an opportunity to object to these actions in advance. The employee grieved, and the USACARA grievance examiner concluded that the cancellation and reassignment were defective because of a failure by the Army to comply with its personnel regulations governing the involuntary reassignment of civilian employees. The grievance examiner held that the decision was binding on the Army based on a CPR provision since it involved a procedural defect. A higher-level official in a USACARA regional office amended the grievance examiner's decision to make it a recommendation rather than a final and binding decision. The Army rejected the recommendation and upheld the cancellation, and the employee filed suit in Federal court.

In Spann, the court upheld the USACARA grievance examiner and stated, 615 F.2d 137 at 140, that:

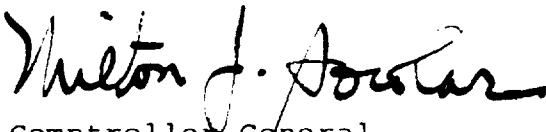
"The regulation imposes finality only on a finding 'of a regulatory or procedural defect.' Findings of substantive defects, by contrast, result only in

recommendations to responsible officials. See CPR 771.3-13. Since the grievance examiner's final and binding decision does not affect the substantive merits of any personnel action, the responsible official may repeat the action if he proceeds in accordance with the regulations and procedures that the grievance examiner has found applicable."

The case was remanded for disposition consistent with its holding.

The USACARA grievance examiner in Mr. Leone's case made a finding of substantive defects and, as the quoted language in Spann indicates, such finding results only in a recommendation to responsible officials. In fact, both the court and Mr. Leone cite to the very same provision of the Army regulations, CPR 771.3-13, but the court concludes that a substantive grievance is only a recommendation.

Accordingly, since the USACARA grievance examiner's report was only a recommendation, it was discretionary and did not have to be followed by Army officials. Therefore, Mr. Leone's claim for backpay on this basis is denied.

*for*   
Comptroller General  
of the United States