Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: John T. Zervas - Retained Grade and Pay - Quarters Allowance - Reconsideration

File: B-231061.3

Date: August 28, 1990

DIGEST

1. A grade GS-12 employee of the Air Force stationed overseas was subject to a reduction in force, refused a grade GS-9 position, and chose to go on discontinued service retirement. Approximately 6 months later, he accepted a grade GS-9 position with the Department of the Army in the same area. Since the employee did not have a right to reemployment or restoration, we agree with an earlier Office of Personnel Management determination that the employee's discontinued service retirement constituted a break in service and that he is not entitled to grade and pay retention. John T. Zervas, B-231061, Jan. 26, 1989, reversed in part.

2. Employee was denied quarters allowance on the basis that he was a local hire. The issue is remanded to the agency to make a factual determination in accordance with its regulations as to employee's actual residence in order to determine if he was a local hire. Erroneous payments, if any, may be considered for waiver under 5 U.S.C. §§ 5584, 5922(b).

DECISION

In our decision John T. Zervas, B-231061, Jan. 26, 1989, we held that the Department of the Army committed an unjustified and unwarranted personnel action when it erroneously denied an employee grade and pay retention, and a living quarters allowance, on the basis of his previous declination of a grade GS-9 position. Upon reconsideration and for the reasons that follow, we reverse in part our decision John T. Zervas, B-231061, Jan. 26, 1989.

BACKGROUND

Mr. Zervas was employed by the Department of the Air Force as a Recreation Services Manager, grade GS-12, step 7, at the Rhein-Main Air Force Base, West Germany, when he was notified in July 1984 of a pending reduction in force (RIF). The RIF notice offered Mr. Zervas a position as a Supervisory

Recreation Specialist, grade GS-9, with retained grade and pay under the provision of 5 U.S.C. §§ 5362, 5363 (1988). Mr. Zervas declined the offer, accepted discontinued service retirement, and was separated from the Department of the Air Force on October 4, 1984.

Mr. Zervas later applied for and accepted a grade GS-9 position on April 8, 1985, with the Department of the Army, Darmstadt Military Community.1/ Mr. Zervas was initially granted and received grade and pay retention at the grade GS-12 level, plus a living quarters allowance. In December 1985, however, when it was discovered that he had declined a grade GS-9 position with the Air Force, the Army determined that since Mr. Zervas had declined the first grade GS-9 position offered to him, he was ineligible for grade and pay retention. Mr. Zervas's salary was then reduced to grade GS-9, step 10, his living quarters allowance was terminated, and he was notified of his indebtedness for the amount he allegedly was overpaid.

We held in our decision of January 26, 1989, that since Mr. Zervas had been in a grade GS-12 position, his declination of a grade GS-9 position did not defeat his entitlement to grade retention. We relied on Federal Personnel Manual (FPM) Supp. No. 990-2, bk. 536 which provides that, if an employee separates from the federal service under conditions which include reemployment or restoration rights, no break in service occurs if the employee exercises those reemployment rights within the time allotted. Since Mr. Zervas had done so, his rate of basic pay, with respect to grade and pay retention, was properly computed as if he had never separated from the federal service.

In so holding, we were unaware that counsel for Mr. Zervas had also requested an opinion on his status from OPM. An Acting Assistant Director of OPM advised Mr. Zervas's counsel in a letter dated August 14, 1986, that once an employee receives written notification that his or her grade or pay is going to be reduced, the employee's eligibility for grade or pay retention ceases if the employee has a break in service of 1 workday or more. 5 U.S.C. §§ 5362(d)(1), 5363(c)(1) (1988). Thus, OPM concluded that Mr. Zervas forfeited his eligibility for grade and pay retention when he declined the offer of

---

1/ Mr. Zervas is currently employed by the Department of the Air Force in Athens, Greece.

continued employment and involuntarily retired from the government.2/

OPINION

Grade and Pay Retention

Upon reconsideration, we agree with OPM's conclusion that Mr. Zervas is not entitled to grade and pay retention. In this regard, statutory provisions provide that an employee loses eligibility for grade and pay retention when the employee has a break in service of 1 workday or more. 5 U.S.C. §§ 5362(d)(1), 5363(c)(1) (1988).

The OPM instructions in FPM Supp. No. 990-2, bk. 536, S5-1b(2) which we relied on in our earlier decision, provides an exception to the break in service provision when an employee separates, or is separated from federal service, under conditions which include reemployment or restoration rights. We previously erroneously read this provision as extending this exception to separated employees who are granted priority placement rights. Those conditions which warrant reemployment or restoration rights are outlined in FPM Supp. No. 990-2, bk. 536, S5-1b(1), and include statutory details outside the federal service, or if, for example, the employee is placed in a leave-without-pay status for the purpose of entering into military service or the Peace Corps.

In this case Mr. Zervas was placed on a reemployment priority list in accordance with 5 C.F.R. § 330.203 (1990). Since Mr. Zervas was not separated under conditions which warranted reemployment or restoration rights, his placement on the priority list merely provided him with eligibility to be considered for a position with an employing agency. Thus, Mr. Zervas did not have a right to reemployment or restoration by virtue of statute or regulation, and an agency would retain discretion as to filling a position. In fact, the record indicates that Mr. Zervas was selected for his position with the Army from a general register, and not from the reemployment priority list. Cf., James L. Hancox, B-197884, July 15, 1980.

Therefore, since Mr. Zervas had a break in service of 1 workday or more when he elected to take discontinued service retirement, and he did not have a reemployment or restoration right, he is not entitled to grade and pay retention.

2/ Mr. Zervas also filed an appeal with the Merit System Protection Board, which was dismissed for lack of jurisdiction. MSPB DC03518610124, Apr. 17, 1986.

Accordingly, our decision John T. Zervas, B-231061, Jan. 26, 1989, is reversed to the extent that it allowed payment on the basis of an unjustified or unwarranted personnel action.

Quarters Allowance

As stated in our earlier decision, we were unable to determine from the record why the Army had determined that Mr. Zervas was a "local hire," and denied him a living quarters allowance. We pointed out that the applicable regulations would allow the agency, in its discretion, to do so. The record furnished by Mr. Zervas's counsel indicates that the Army has a policy whereby it treats former employees as local hires who remain in the overseas area of their separation in excess of 90 calendar days after the date of their separation.3/ We also note that the 90-day break in service policy is also utilized by Mr. Zervas's current employer, the Department of the Air Force.4/

The above policy apparently is derived from para. C4202-2 (change No. 131, Sept. 1, 1976) of the Joint Travel Regulations, Vol. 2 (2 JTR), which pertains to a loss of travel and transportation entitlement. That provision provides that a delay of travel after overseas separation not in excess of 90 calendar days will be considered a reasonable period of time for delay of travel to the employee's designated place of residence. The provision also provides for a written request for approval beyond 90 days.

Since the issue here involves a determination as to whether Mr. Zervas is a local hire we believe that the provisions in 2 JTR cited in our previous decision pertaining to negotiation of travel renewal agreements apply. 2 JTR para. C4002-3b3 (change No. 216, Oct. 1, 1983). The provision provides that an initial agreement will be negotiated with a locally hired individual who is a former employee of the same or another federal department or agency separated by reduction in force during the previous 6 months who is on a reemployment priority list, and has been authorized delay in return transportation for the primary purpose of exercising reemployment priority rights.

3/ Letter from Department of the Army, U.S. Army Civilian Personnel Center, Alexandria, Virginia, to Mr. Zervas's attorney, May 22, 1986.

4/ Letter from Department of the Air Force, Headquarters 7206 Air Base Group, Athens, Greece, to Mr. Zervas, Oct. 14, 1987, denying him home leave.

One of the conditions for negotiation of a new travel renewal agreement is that an employee must establish to the satisfaction of the appointing official, a bona fide place of actual residence in the United States outside the geographical locality of the post of duty. Guidance is also provided in the regulations in the form of factors for consideration as to a determination of the place of actual residence. 2 JTR para. C4004-b (change No. 288, Oct. 1, 1989).

Although Mr. Zervas was on discontinued service retirement he remained on a reemployment priority list overseas, was reemployed within approximately 6 months of his separation, and was advised by the Air Force that he had 1 year from his separation date to exercise his return rights to the United States. Therefore, we believe that he would be eligible for negotiation of a renewal travel agreement under the 2 JTR provisions.

Our Office has consistently held that the responsibility for determining the place of actual residence of an employee rests with the administrative agency and that a determination be made on the basis of all available facts. Such determination must, of necessity, be based on the facts of each case, and ordinarily we will not question any reasonable determination made by the agency as to the employee's actual place of residence. Rafael F. Arroyo, B-197205, May 16, 1980, reconsideration, Feb. 16, 1982; Estelle C. Maldonado, 62 Comp. Gen. 545 (1983).

Therefore, since the facts in this case do not indicate why the Army, and Mr. Zervas's current employer, the Air Force, have determined that he was a local hire we believe that both agencies should make such a determination in accordance with the applicable provisions of 2 JTR. Further, Mr. Zervas should be given an opportunity to present proof as to his actual place of residence. Arroyo, May 16, 1980, supra, at 7.

Waiver

Mr. Zervas initially received grade and pay retention at the grade GS-12 level plus living quarters from April 8, 1985, when the Army discontinued such payments for the reasons stated in our earlier decision. Since we have now determined that Mr. Zervas was not entitled to grade and pay retention, he may file a request for waiver of overpayments under the provisions of 5 U.S.C. § 5584 (1988), in accordance with the standards established by this Office in 4 C.F.R. part 91 (1990). In the event that the Army factually determines that Mr. Zervas is a local hire and therefore not entitled to a quarters allowance, the head of the agency or his designee may waive such amount under the provisions of 5 U.S.C. § 5922(b) (1988). Guy F. Windley, B-195322, Nov. 27, 1979. In the

alternative, the request for waiver may be sent to this Office. Bernard E. Shea, B-226143, Nov. 22, 1988.

Milton J. Socolar

for Comptroller General
of the United States