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DECISION



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

FILE: B-191081

DATE: July 26, 1978

MATTER OF: Richard E. Pozek -- Transportation expenses,
failure to fulfill contract

- DIGEST:
1. The basis for assumption by the Government of transportation expenses of an employee returning from an overseas assignment before completion of an agreed period of service is where the employee is separated for reasons beyond his control which are acceptable to the agency concerned. 5 U.S.C. 5722 (1976).
 2. The acceptability of the reasons for an employee's resignation prior to completion of his agreed period of service pursuant to 5 U.S.C. 5722, is for determination by the agency involved. Such determination is reviewable by our Office only if the facts establish that the determination was arbitrary and capricious. 56 Comp. Gen. 606 (1977).
 3. Backpay is not authorized where the employee's separation is voluntary and not beyond his control. B-187184, April 3, 1978.
 4. There is no requirement that an employee's name be placed on a DOD priority placement list maintained as a part of the Program for Stability of Civilian Employment where the employee's separation was voluntary and not the result of base closures, consolidations, transfer of functions, or reductions that result from technological and organizational changes.

We have been asked to review the claim of Mr. Richard E. Pozek for reimbursement for transportation expenses upon return from an overseas assignment as an employee of the Department of the Army, to have his name entered on the Priority Placement Program of the Department of Defense (DOD) and backpay for lost wages.

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On October 19, 1975, Mr. Pozek transferred from the Department of Health, Education, and Welfare (HEW) to the Department of the Army for duty in Europe. It is claimed by Mr. Pozek that he was recruited for duty overseas by the Department of the Army as a real estate claims investigator. He has submitted a job description (DA Form 374, 1 June 1961) in which it is claimed the duties and functions of a claims investigator are clearly outlined and was the basis upon which he was recruited. The title on the job description is "Realty Specialist." On June 25, 1975, Mr. Pozek signed a transportation agreement for overseas employees (DA Form 1617, 1 July 1967) in which he agreed to remain employed by the Army at the overseas post of duty to which assigned or reassigned for a minimum period of 36 months, beginning with the date of his arrival at the overseas duty station. That agreement shows that he arrived at the overseas station on October 22, 1975.

It is alleged by the employee that upon arrival overseas, he was told there was no claims investigation work available and that he was assigned various clerical duties, messenger duties and other odd jobs. After a year of unsuccessful attempts to rectify his job assignments to his satisfaction the employee resigned his position on January 8, 1977. His request for travel expenses for return to the continental United States was denied by the Army and he returned to the United States at his own expense. It is claimed that in his attempt to secure suitable employment upon his return, he was denied placement on the DOD priority register. It is Mr. Pozek's contention that the actions of the Army effected a significant change in his employment status for which he is entitled to reimbursement for moving and transportation expenses incurred by him in his return from overseas, for placement on the DOD priority register for employment and backpay for lost wages.

It is the contention of the Army that Mr. Pozek was recruited as a Realty Specialist, the occupation code cited on the Recruitment Action, and all the duties assigned him were within that code. A determination was made by the Army that it did not consider his reason for resignation as acceptable or as one beyond his control and thus, could not recommend that he be authorized transportation to the continental United States at Government expense.

The statutory provisions applicable to Mr. Pozek's claim are contained in section 5722 of title 5, United States Code (1970), as follows:

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"(a) Under such regulations as the President may prescribe and subject to subsections (b) and (c) of this section, an agency may pay from its appropriations—

"(1) travel expenses of a new appointee and transportation expenses of his immediate family and his household goods and personal effects from the place of actual residence at the time of appointment to the place of employment outside the continental United States; and

"(2) these expenses on the return of an employee from his post of duty outside the continental United States to the place of his actual residence at the time of assignment to duty outside the United States.

* * * * *

"(c) An agency may pay expenses under subsection (a)(2) of this section only after the individual has served for a minimum period of—

* * * * *

"(2) not less than one nor more than 3 years prescribed in advance by the head of the agency, if employed in any other position:

unless separated for reasons beyond his control which are acceptable to the agency concerned. These expenses are payable whether the separation is for Government purposes or for personal convenience."

Implementing regulations for DOD employees are contained in paragraphs C4009 and C4357 of Joint Travel Regulations, Volume 2.

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Mr. Pozek arrived in his overseas assignment on October 22, 1975, and therefore was not eligible for return to the continental United States at Government expense under the terms of his transportation agreement and in accordance with the law and regulations until October 21, 1978.

The basis for the assumption by an agency of the United States of the expenses of transportation of an employee under the statute and regulations, prior to the completion of his agreed period of service, is confined to the situation where the employee is "separated for reasons beyond his control which are acceptable to the agency concerned." The acceptability of the reasons for Mr. Pozek's premature resignation primarily is for determination by the Department of the Army. We have long held that such a determination is reviewable by our Office only if the facts establish that the determination was arbitrary or capricious. 56 Comp. Gen. 606 (1977); B-170392, August 5, 1970; B-169880, July 6, 1970; and B-160646, March 10, 1967.

Clearly, there is a difference between the facts as presented by the Army and those presented by Mr. Pozek. In deciding claims, this Office does not conduct adversary hearings. Rather, we operate on the basis of the written record presented to us by the parties. Where the record before this Office contains a dispute of fact which cannot be resolved without an adversary proceeding, it is our longstanding practice to resolve such disputes in favor of the Government, B-189673, April 6, 1970. On the record before us, therefore, we have no basis for concluding that Mr. Pozek had a formal and binding agreement with the Army to the exclusive performance of duty as a real estate claims investigator to the exclusion of all other assignments.

On the evidence of record we cannot say that the administrative conclusion of the Army that Mr. Pozek's reason for separation was not acceptable nor one beyond his control is unreasonably supported

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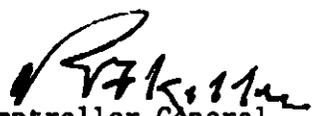
by the evidence or that it is without factual foundation. Therefore, we may not substitute our judgment for that of the Department of the Army on the ground that its conclusion was arbitrary or capricious and consequently may not direct the allowance of Mr. Pozek's claim for reimbursement of transportation expenses.

The authority for payment of backpay is contained in 5 U.S.C. 5596 (1976). However, such authority is limited to an employee who is found by appropriate authority to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of an employee, 54 Comp. Gen. 760 (1975). Backpay is not authorized where the employee's separation is voluntary and not beyond his control. B-187184, April 3, 1978. See also B-148045, February 12, 1962.

The DOD has established a program for civilian employment stability. This program is outlined in DOD Directive Number 1400.20, dated August 13, 1971. The policy governing this program as set forth in the directive is "To minimize the adverse effect on individuals affected by base closures, consolidations, transfer of functions, and reductions that result from the technological and organizational changes necessary to keep the DoD establishment up to date." Since Mr. Pozek's separation did not result from any of the stated actions set forth in the DOD directive and was in fact voluntary, it is our view that there is no requirement that his name be placed on any priority placement list maintained by DOD as a part of the DOD Program for Stability of Civilian Employment.

However, the file shows that the Chief, Civilian Career Management Field Agency of the Department of the Army has stated that if Mr. Pozek is interested the Department of the Army in coordination with the Corps of Engineers will circulate Mr. Pozek's Personnel Qualifications Statement, SF-171, in an endeavor to place him in a continuing position. Such a form was forwarded to him.

Accordingly, Mr. Pozek's claim for transportation expenses, for backpay and for placement on the DOD preferential placement list is disallowed.


Deputy Comptroller General
of the United States