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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gerald R. Solomon

File: B-252849

Date: August 3, 1993

DIGEST

A GS-13 employee of the Social Security Administration voluntarily transferred to a GS-12 position with the Department of the Army in Germany. The Army had erroneously found him qualified for the GS-12 position. Since no other position was available for him in Germany, the Army subsequently returned him to the United States in another GS-12 position. The employee claims backpay at the GS-13 level under 5 U.S.C. § 5596 (1988) on the basis that he would not have left his GS-13 position but for the opportunity of the position in Germany. His claim may not be paid since the administrative error did not prevent his hiring as a GS-12 from taking effect as originally intended, and since he continued to receive the same salary and overseas allowances until his reassignment back in the United States. Thus, he suffered no loss of pay or allowances during the period of the erroneous personnel action remediable under the Back Pay Act.

DECISION

Mr. Gerald R. Solomon, an employee of the Department of the Army, has appealed our Claims Group's disallowance¹ of his claim for backpay, accrued interest, and any other monies to which he may be entitled, as a result of his being erroneously found qualified by the Army to fill a Supervisory Psychologist position in Bad Kreuznach, Germany. For the reasons explained below, we sustain the disallowance of the claim.

BACKGROUND

Mr. Solomon was originally employed for several years by the Social Security Administration (SSA) as a Personnel Psychologist, GS-13, step 7, in Baltimore, Maryland. In

¹Settlement Certificate Z-2868042, Feb. 18, 1993.

February 1987, he applied for and was selected as being qualified to fill a position as Clinical Director, Supervisory Psychologist, at the GS-12, step 10, grade level with the Department of the Army in Germany. After he had reported for duty, a review of his qualifications by the Army revealed that Mr. Solomon should not have been found qualified for his new position since he had no experience in the type of counseling the position required. The Army admits its error in qualifying him for the position.

After being informed that he was not qualified to fill the position in Germany, Mr. Solomon expressed a desire to return to the Baltimore-Washington area in a GS-13 position, and he filed a grievance against the Army. On January 5, 1988, his grievance was forwarded to Army headquarters. The report of findings and recommendations on the grievance supported two requests by the employee, namely, registration in the Priority Placement Program at the GS/GM-13 grade level, and the dispatch of a letter to the Social Security Administration explaining his situation and requesting assistance.

In accordance with the recommendations on the grievance, in March 1988 the Army wrote to the Commissioner, SSA, requesting assistance in resolving the matter. It was determined, however, that Mr. Solomon could not return to a position at the GS-13 grade level at SSA except through competition. The Army also registered Mr. Solomon as a priority candidate in its Priority Placement Program and attempted to place him in a position in Germany at the GS-12 or GS-13 grade levels, but there were no vacant positions. The Army also attempted to place Mr. Solomon in a GS-13 position in the United States with the Army but was able to place him only in a GS-12 position, with retained pay, at the Aberdeen Proving Ground, Maryland, in September 1988, where he is presently employed.

During the period that Mr. Solomon remained in Germany, after removal from the Clinical Director position, he was placed in several temporary positions and continued to receive his salary as a GS-12, step 10, and all overseas allowances to which he was entitled.

Mr. Solomon contends that the Army committed an unjustified and unwarranted personnel action by erroneously qualifying him to fill the Clinical Director position, GS-12, in Germany, although he had questioned his qualifications for the position. He states that but for that error, he would not have resigned his GS-13 position with SSA and accepted the position in Germany at grade GS-12, and then been required to return to the United States prematurely and at a lower grade and pay than he had been receiving in his prior position with SSA. Mr. Solomon also complains that his

return to the United States caused him to lose the Maryland state tax exemption and the \$10,000 per year housing allowance he was receiving while in Germany, which he indicates were incentives to his acceptance of the lower-paying position with the Army.

The Army declined to pay Mr. Solomon's claims on the basis that since he continued to be paid at the GS-12, step 10, grade level, he did not suffer any loss of pay for which they are authorized to reimburse him.² Our Claims Group disallowed his claim on essentially the same basis.

DISCUSSION

Entitlement to backpay is governed by the provisions of the Back Pay Act, 5 U.S.C. § 5596 (1988). Section 5596(b) provides that an employee who is found by appropriate authority to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal of all or part of his pay, allowances, or differentials, on correction of the personnel action, is entitled to receive "for the period for which the personnel action was in effect" an amount equal to all or any part of the pay, allowances, or differentials the employee normally would have earned or received during the period if the personnel action had not occurred.

The regulations implementing 5 U.S.C. § 5596 define "unjustified or unwarranted personnel action" as an act of commission or omission, i.e., failure to take an action or confer a benefit, that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law. 5 C.F.R. § 550.803.

²In 1988, Mr. Solomon filed an appeal with the Merit Systems Protection Board (MSPB) contesting the Army's failure to place him in a GS-13 position, to register him in its Priority Placement Program at the GS-13 level, and to award him pay retention at GS-13. The MSPB held that it had no jurisdiction to review the Army's personnel actions in Mr. Solomon's case for various reasons, including, in effect, that he had not suffered a demotion by the Army. Gerald R. Solomon v. Department of the Army, MSPB Docket No. DC34438810458, Oct. 27, 1988. Mr. Solomon filed a second appeal with the MSPB on similar grounds which the MSPB dismissed as barred by the doctrine of res judicata. Gerald R. Solomon v. Department of the Army, MSPB Docket No. DC07529110390, June 4, 1991. Mr. Solomon filed an appeal of the MSPB's June 4, 1991 dismissal in the U.S. Court of Appeals for the Federal Circuit (No. 92-3076); however, that appeal was dismissed upon his motion to withdraw the appeal.

We have held that not every error in the processing of personnel actions constitutes an unjustified or unwarranted personnel action for which the Back Pay Act provides a remedy. We have recognized as unjustified and unwarranted actions, clerical or administrative errors that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively.³

The facts involved in Mr. Solomon's case do not fall within any of the above three situations. Situations (2) and (3) are clearly not applicable, in that he was not improperly demoted or separated or otherwise improperly removed from his position causing a loss of pay or allowances (situation 2), nor was there a failure to promote him, grant him a bonus or otherwise increase his pay contrary to some nondiscretionary policy or regulation (situation 3).

As to situation (1), the record shows that Mr. Solomon's decision to accept the downgrade from GS-13 with SSA to GS-12 with the Army was voluntary, and his hiring by the Army at the GS-12 grade level was intentional. Even though Mr. Solomon ultimately was unable to remain in that position which the Army had erroneously determined he was qualified to fill, the Army continued to pay him at the GS-12 salary level at which he was hired and continues to pay him at that salary level, but without the overseas housing allowance to which he is no longer entitled since he has returned to the United States and is no longer an overseas employee. That is, the Army's erroneous qualification action did not cause a withdrawal of all or part of the pay, allowances, or differentials which he was entitled to receive for the period for which the personnel action was in effect, as required to be remedied under the Back Pay Act, 5 U.S.C. § 5596(b)(1). While the correction of the error ultimately resulted in his being returned to the United States, since Mr. Solomon continued to receive his salary as a GS-12, step 10 (with all overseas allowances to which he was entitled until he was returned to the United States), the erroneous personnel action did not result in the reduction of all or a part of Mr. Solomon's pay, allowances, or differentials, during the period it was in effect.⁴

³See 55 Comp. Gen. 836, 838 (1976); 54 *id.* 888 (1975); Betty Akin Holmes, B-202296, Dec. 29, 1981.

⁴See Samuel Freiberg, 59 Comp. Gen. 185, 187 (1979).

As noted, the Army's original hiring of Mr. Solomon was not at the GS-13 grade level, and his leaving the SSA position at that grade level was voluntary. The relief Mr. Solomon seeks, i.e., backpay representing the difference between the pay of a GS-12, step 10, and a GS-13, step 7, with increases to GS-13, step 10, from the time he left the SSA position and continuing indefinitely, is in the nature of consequential damages which we have held are not payable under the Back pay Act. See Lewis E. Robinson, B-230496, June 7, 1988.⁵

for 

James F. Hinchman
General Counsel

⁵As noted, Mr. Solomon's loss of the overseas housing allowance was not due to the erroneous personnel action, but was due to its correction requiring his return to the United States. The loss of the state tax exemption, likewise, was a result of the correction of the error and, in any event, it is not a "pay, allowance or differential" payable under the Back Pay Act. Since we find no payment due, the interest claim is moot.

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