



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Janice N. Addison - Severance Pay

File: B-225229

Date: November 3, 1987

---

### DIGEST

A former employee of the Mine Safety and Health Administration who declined to accompany her activity when it moved from Princeton to Pineville, West Virginia, was allowed to resign under involuntary conditions in lieu of transferring to Pineville. She is not entitled to severance pay under the provisions of 5 U.S.C. § 5595 and the implementing regulations since the agency determined that Princeton and Pineville are in the same commuting area. We will not overturn an agency's determination on commuting area unless that determination is arbitrary, capricious, or clearly erroneous. Where the agency's determination that Princeton and Pineville were in the same commuting area is based upon the commuting patterns of other employees transferred earlier, we cannot say that the agency's determination was arbitrary, capricious, or clearly erroneous.

---

### DECISION

#### ISSUE

This action is in response to a request from a union concerning the payment of severance pay to a former employee who declined to accompany her activity when it was transferred to another location which the agency determined to be within the same commuting area. Severance pay may not be allowed if an employee declines reassignment within the same commuting area. Since under the facts presented we cannot say that the agency's determination of the commuting area was arbitrary, capricious or clearly erroneous, we sustain the agency's denial of severance pay.

#### BACKGROUND

This decision is in response to a request from Mr. James G. Dodson, National Representative, American Federation of Government Employees, on behalf of Ms. Janice N. Addison. This matter was presented under our procedures set forth at

040456

4 C.F.R. Part 22 (1987) for a decision on appropriated fund expenditures which are of mutual concern to federal agencies and labor organizations.

Ms. Addison was a Lead Mine Inspection Recording Clerk, grade GS-1802-5, in the Princeton, West Virginia suboffice of the Mine Safety and Health Administration (MSHA), Department of Labor. By letter dated October 1, 1986, Ms. Addison was advised by MSHA that the Princeton facility was going to be closed and that she was to be reassigned to the same position in Pineville, West Virginia. Ms. Addison returned the agency's reply form on October 9, 1986, indicating that she refused the reassignment and stating her reasons as follows:

"(1) The daily travel (84.6 mi.) is too great and will require at least (3) hrs. travel time. (2) The roads are very mountainous and in the winter time are hazardous. (3) I have a 9 yr. old child and it would require me to be away from her too many hours. (12 hrs.) (4) Travel expenses and babysitting expenses would take my salary. (5) This is an involuntary resignation based on the relocation of function. (6) I have been informed that I am not entitled to severance pay, because other employees are commuting; however, I do not accept this as a reasonable commuting distance and terrain.\* \* \*"

By memorandum dated November 14, 1986, the agency proposed Ms. Addison's removal for cause on the ground that she refused to accept a reassignment to a position which was at the same grade and pay as her then-current position and which was in the same commuting area. Ms. Addison answered this proposal in writing on December 3, 1986, reiterating her disagreement with the commuting area designation. The removal proposal was sustained by the agency in a notice of decision dated December 18, 1986.

Ms. Addison appealed this decision to the Merit Systems Protection Board (MSPB). Prior to the MSPB hearing, the agency and the union executed a Settlement Agreement dated February 23, 1987. By the terms of the Agreement, the agency rescinded the removal action and Ms. Addison

resigned, under involuntary conditions, in lieu of acceptance of a transfer to Pineville, West Virginia. Regarding severance pay, the Settlement Agreement contained the following provisions:

"3. The Appellant [Ms. Addison] does not waive her request for severance pay and hereby submits her request to the Agency for their official decision on her request for severance pay.

"4. If the Agency denies her request for severance pay they will furnish the appellant with her appeal rights along with their decision."

On behalf of Ms. Addison, the union filed a formal request for severance pay with the agency on March 3, 1987. In a June 12, 1987 letter to the union, the agency denied severance pay for Ms. Addison based on the agency's determination that Princeton and Pineville are in the same commuting area. The agency stated that this decision was based on the fact that "the actual commuting patterns of MSHA employees who work in the MSHA office at Pineville indicate that a significant number of employees live at least 43 miles away from the office and travel back and forth each day to work." The agency contends that "these patterns cannot be ignored in determining what the local commuting area is in that part of West Virginia."

Although Ms. Addison claims she would have to move her residence to accept the reassignment, the agency argues that such a move is not sufficient to establish that the transfer would be outside the local commuting area, citing to our decision in Vivian Spencer, B-210524, June 6, 1983. The agency states that the commuting area is determined independently based on other factors such as the actual commuting patterns of those who work in the Pineville office.

By letter dated June 22, 1987, to this Office, the union requested a review of the agency decision to deny severance pay for Ms. Addison. The union includes the following arguments to support the view that the agency's decision was arbitrary, capricious and clearly erroneous. First, the

union states that, under the terms of the Settlement Agreement, Ms. Addison was allowed to resign under involuntary conditions in lieu of transferring to Pineville. Thus, the union argues that the agency has tacitly acknowledged that the relocation of the Princeton suboffice to Pineville was a transfer of function outside the commuting area and that Ms. Addison would have been compelled to move in order to continue employment with the agency. Next, the union argues that other employees transferred earlier were told in their notification letters that the move was considered outside the Princeton commuting area and that they would be authorized relocation allowances. However, there was no mention of commuting area in Ms. Addison's notification letter, and, after the agency determined that it was the same commuting area (some time between October 1 and November 14, 1986, according to the parties' Stipulation of Facts), this decision was applied only to Ms. Addison and not to those employees transferred earlier.

The union also contends that the agency decision failed to take into account the fact that various employees who were transferred at the same time as Ms. Addison did not continue their jobs in Pineville, citing as their reason for leaving the difficulty of the commute. Finally, the union argues that the agency decision failed to take into account the fact that Ms. Addison was found eligible for unemployment compensation by the State of West Virginia, a determination which the agency did not challenge even though that decision stated that the distance from Ms. Addison's home to Pineville was "excessive."

In a letter dated August 24, 1987, the agency responded to the points raised in the union's letter. The agency states that under the terms of the Settlement Agreement, the question of whether Ms. Addison is entitled to severance pay is left to the agency to decide. The agency next states that the decision regarding commuting patterns was based on the patterns of employees who had been transferred prior to the time of Ms. Addison's transfer and therefore the June 12, 1987 decision letter was not misleading in failing to mention the patterns of employees transferred at the same time as Ms. Addison. Finally, the agency argues that the fact that the State of West Virginia found Ms. Addison eligible for unemployment compensation in no way binds the

Department of Labor or the General Accounting Office in determining eligibility for severance pay.

OPINION

Severance pay is authorized by 5 U.S.C. § 5595 (1982) which reads, in pertinent part, as follows:

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

\* \* \* \* \*

"(2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;

is entitled to be paid severance pay in regular pay periods by the agency from which separated."

Implementing regulations promulgated by the Office of Personnel Management are found in 5 C.F.R. §§ 550.701-708 (1986). Section 550.701(b)(2) of the regulations provides in pertinent part as follows:

"(2) This subpart does not apply to an employee who at the time of separation from the service, is offered and declines to accept an equivalent position in his agency in the same commuting area \* \* \*."

The term "same commuting area" as it relates to severance pay is not defined in the severance pay regulations. However, for purposes of determining competitive areas in connection with reduction-in-force actions, section 1-4b(5), subchapter 1, chapter 351 of the Federal Personnel Manual (Inst. 263, July 7, 1981), states the following with regard to the meaning of a local commuting area:

"(5) Local Commuting Area means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and

can reasonably be expected to travel back and forth daily to their usual employment."

We have held that a determination regarding commuting area is the responsibility of the Office of Personnel Management (OPM) and the agency concerned, and that a determination that there had been no change in commuting area negates any claim for severance pay by involuntary separation. Vivian W. Spencer, B-210524, June 6, 1983; Marshall S. Hellman, B-182300, January 16, 1975, affirmed on reconsideration, December 4, 1975; and June Fay Harmon, B-182513, December 4, 1974. We will not question the agency's determination unless it is shown to be arbitrary, capricious, or clearly erroneous. Id.

In this case, the agency determined that Princeton and Pineville were in the same commuting area since the commuting patterns of employees transferred prior to Ms. Addison indicated that a significant number of employees continued to commute from their old residences in the Princeton area to the Pineville office. In making its decision, the agency stated that it studied thoroughly the information provided by Ms. Addison as well as other information relating to this case. Under the circumstances, we believe that it was not unreasonable for the agency to change its position on this issue between the time the first group of employees was transferred and the time Ms. Addison was to move since the agency did not have the information on commuting patterns available at the time the first employees were transferred. Similarly, it was impossible for the agency to take into consideration the commuting patterns of those transferred at the same time or after Ms. Addison at the time the decision affecting Ms. Addison was made. Finally, we note that the employees who were transferred earlier in 1986 from Princeton to Pineville were initially authorized relocation expenses. However, in its response to Ms. Addison's appeal to the MSPB, the agency points out that it later determined relocation expenses were not allowable for those employees.

Regarding Ms. Addison's particular situation, we do not agree with the union's contention that the agency tacitly acknowledged her eligibility for severance pay when the agency entered into the Settlement Agreement which allowed Ms. Addison to resign. The express terms of the Settlement

Agreement, quoted above, clearly left open the question of eligibility for severance pay, a fact which was recognized by a decision of the Merit Systems Protection Board dated May 7, 1987, denying Ms. Addison's petition which alleged agency noncompliance with the Settlement Agreement.

Further, the fact that the agency did not mention that Princeton and Pineville were in the same commuting area in the October 1, 1986 letter to Ms. Addison would not negate that determination as it applies to her. There is no requirement in the regulations that the agency include certain information in the initial notice letters. Moreover, it is clear from item number (6) of Ms. Addison's statement of reasons on the reply form dated October 9, 1987, quoted above, that she was aware of the agency's change in position on this issue at the time she made her decision to refuse reassignment.

Finally, there is no requirement that the agency take into consideration or adhere to the decisions of a state unemployment commission on eligibility for unemployment compensation in matters pertaining to the determination of eligibility for severance pay. The fact that the State of West Virginia found the distance between Ms. Addison's residence and the Pineville office "excessive" does not overcome the agency's determination of what could be considered reasonable in terms of a commuting area.

We note that the Office of Personnel Management (OPM) was contacted informally by the agency concerning the issues involved in this case and that OPM is of the view that the agency determination and actions were reasonable and within the scope of its responsibilities under the regulations.

Accordingly, since we do not find the agency's actions arbitrary, capricious, or clearly erroneous, we sustain the agency's denial of Ms. Addison's claim for severance pay.

*Milton J. Fowler*  
for Comptroller General  
of the United States