In the United States Court of Federal Claims

Case No. 05-961C (Consolidated)
(Filed: July 11, 2006)
NOT TO BE PUBLISHED

* *

TED A. BRODOWY, ET AL.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

* *

Malcom Scott Young, Thompson Hine, LLP, Cincinnati, Ohio, attorney of record for Plaintiffs.

Joan M. Stentiford, Commercial Litigation Branch, Department of Justice, Washington, D.C., attorney of record for Defendant. With her on the briefs were ***Peter D. Keisler***, Assistant Attorney General, ***David M. Cohen***, Director, ***Kathryn A. Bleecker***, Assistant Director, and ***David R. Feniger***, Trial Attorney.

Sarah Leigh Martin, law clerk.

OPINION

BASKIR, Judge.

Plaintiffs, current or former air traffic controllers, had been paid under the General Schedule ("GS") pay system prior to 1999. They all transferred to higher level facilities after the FAA converted all higher level facilities to a new pay system (the "ATC" system). They bring claims for back pay, alleging that they were entitled to a re-grade of their pay before or upon transferring to the new facilities and into the ATC pay system. Plaintiffs fail to establish that their Complaint is grounded on a money-mandating statute. **Therefore, the Defendant's Motion to Dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is granted.** *See Fisher v. United States*, 402 F.3d 1167, 1175 (Fed. Cir. 2005).

BACKGROUND

Plaintiffs are ten air traffic controllers currently or formerly employed by the U.S. Federal Aviation Administration ("FAA") who seek the retroactive recovery of wages pursuant to the Back Pay Act. The FAA formerly employed air traffic controllers at facilities ranging in classification from Level 1 through Level 5, Level 5 towers being the busiest. The GS level of air traffic controllers was a function of their facility, ranging from GS 10 for Level 1 to GS 15 for Level 5. According to the Plaintiffs, all air traffic controllers were compensated under the (FG)GS pay system before 1998. The FG system refers generically to the system that was to be developed for FAA personnel pursuant to 49 U.S.C. § 40122(g)(1). *See* Def. Br. at 19. The General Service ("GS") pay system is the general pay system for employees of the Federal Government in administrative, professional, and technical positions that is commonly utilized at other government agencies. The Plaintiffs continued to be paid under the GS system until late 1999, and they refer to that compensation as the (FG)GS system.

In July 1998, the National Air Traffic Controllers Association ("NATCA") and the FAA reached a collective bargaining agreement ("CBA") regarding the institution of a new pay system. This Air Traffic Controller ("ATC") pay system created a set of "Pay and Reclassification Rules" for FAA employees that was to replace the existing (FG)GS pay system. Under the new ATC pay system, air traffic controllers at each of the Level 2 through 5 facilities were given an ATC designation that ranged from 6 through 12. The ATC pay system provided broader "pay bands" within each level that replaced the grades and steps of the previous (FG)GS pay system. Rule 35 of the agreement outlined a two-step procedure for converting the pay levels of air traffic controllers in Level 2 to 5 facilities from the (FG)GS to the ATC pay system. Rule 35's formula was not merit based, but rather tied to the air traffic controllers' previous grade and step levels under the old system. Level 1 facilities, however, were not classified within the new ATC levels.

Level 1 facilities were slated for private operation. From 1994 to 1998, the FAA privatized over seventy-five percent of its Level 1 air traffic facilities. Air traffic controllers at Level 1 facilities had to relocate to another higher level facility to remain employed by the FAA, or could retire or resign from federal service. The FAA transferred these Level 1 air traffic controllers to other higher level facilities. The FAA then applied 5 U.S.C. § 5334(b), which dictates pay conversions for promotions or transfers within GS pay system, to establish the employees' higher pay grades under the (FG)GS pay system corresponding with their new, higher level jobs. Then, on October 1, 1998, the new ATC pay system came into effect for air traffic controllers employed at Level 2 to 5 facilities. Upon this conversion, the FAA applied Rule 35 to convert the pay levels of each employee who was already employed at facilities ranging from Level 2 through 5.

In March 1998, a US. District Court temporarily vacated the FAA's privatization program. *See Nat'l Air Traffic Controllers Ass'n v. Sec'y of DOT*, 997 F. Supp. 874 (N.D. Ohio 1998). The FAA thus did not transfer its remaining Level 1 air traffic controllers, including Plaintiffs, before converting to the new ATC pay system. Plaintiffs remained at their Level 1 facilities and continued to be compensated under the (FG)GS pay system. The FAA did not establish an ATC pay scale for Level 1 facilities. When in 1999 the privatization program was allowed to continue, Plaintiffs were transferred to higher level facilities in or about October, November, or December 1999, approximately a year after the conversion to the ATC system had taken effect at those facilities.

Plaintiffs transferred directly into the ATC pay system when they began at their higher level facilities in 1999. Thus, their pay was automatically converted into the ATC pay system. Plaintiffs were assigned the lowest pay grade in the corresponding pay band of the ATC system, essentially being treated as newly hired employees. Plaintiffs allege that they understood from the FAA that they would transfer to the new ATC facilities under the (FG)GS pay regulations, be re-graded, and then through application of Rule 35 would convert into the ATC pay system at a higher level, just as the other air traffic controllers had. However, the FAA did not apply 5 U.S.C. § 5334(b) to determine Plaintiffs' new pay levels.

Plaintiffs filed their Complaint in this Court on August 31, 2005. They bring claims for back pay under the Back Pay Act, Rule 35 of the Pay and Reclassification Rules of the CBA, the Fifth Amendment to the U.S. Constitution, the Classification Act, and 5 U.S.C. § 5334(b). Plaintiffs claim that they lost pay steps they had earned under the (FG)GS pay system when they were assigned the lowest pay grade at their respective new facilities. The Defendant filed a Motion to Dismiss, which was fully briefed and argued.

ANALYSIS

Before the Court is the Defendant's Motion to Dismiss for lack of subject matter jurisdiction, based on Rule 12(b)(1) of the U.S. Court of Federal Claims ("RCFC"), or in the alternative, for failure to state a claim upon which relief can be granted under RCFC 12(b)(6). Because we find no subject matter jurisdiction, we do not address Defendant's arguments under Rule 12(b)(6) for failure to state a claim.

On motions to dismiss, the Court views the facts alleged in the Complaint in the light most favorable to the non-moving party. *See Patton v. United States*, 64 Fed. Cl. 768, 773 (2005). Because the Defendant's Motion challenges this Court's jurisdiction, we may also consider outside evidence. *Id.* at 773.

The U.S. Court of Federal Claims is, like all Federal courts, a court of limited jurisdiction. *See Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997). This Court may only hear a claim brought against the United States if Congress specifically and unambiguously waived the Government's sovereign immunity for such a suit.

United States v. King, 395 U.S. 1, 4 (1969). According to the Tucker Act, a suit may be brought in this Court if it is founded upon the Constitution, an Act of Congress, a regulation, or a contract with the United States, if it does not sound in tort. 28 U.S.C. § 1491(a)(1).

The Tucker Act does not itself create a substantive right of recovery; a plaintiff must identify a money-mandating provision creating a substantive right and waiving the United States' sovereign immunity in order for this Court to have jurisdiction. *E.g.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 398 (1976). A money-mandating provision is one that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 607 (1967)).

The Defendant's Motion also focuses on the argument that Plaintiffs are seeking the benefit of positions to which they have not been appointed. However, the Court must first examine the provisions relied upon by Plaintiffs to determine whether any of them confers jurisdiction on this Court. As the necessary money-mandating provision, Plaintiffs rely upon the Back Pay Act, the ATC Pay and Reclassification Rules embodied in the collective bargaining agreement, the Fifth Amendment to the U.S. Constitution, 5 U.S.C. § 5101 (the Classification Act), and 5 U.S.C. § 5334(b). At oral argument Plaintiffs rested solely on the latter statute, but as jurisdiction is not waivable, we examine these other possible grounds as well.

A. The Back Pay Act

The Plaintiffs seek compensation under the Back Pay Act, 5 U.S.C. § 5596, for money allegedly due them based on an improper grade determination. The Back Pay Act entitles an employee to money damages when he or she "is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of" his or her pay. 5 U.S.C. § 5596(b)(1).

It is well established that the Back Pay Act is not itself a jurisdictional statute, as Plaintiffs' counsel conceded at oral argument. *See Salinas v. United States*, 52 Fed. Cl. 399, 401 (2002), *aff'd*, 323 F.3d 1047 (Fed. Cir. 2003) (citing *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983)). In order for this Court to have jurisdiction over a claim for back pay, "'[s]ome provision of law other than the Back Pay Act must first mandate, or at least be interpreted to mandate, money damages to an employee suffering an unjustified or unwarranted personnel action . . .'" *Salinas*, 52 Fed. Cl. at 401 (quoting *Walker v. United States*, 11 Cl. Ct. 77, 80 (1986)); *accord*

Spagnola v. Stockman, 732 F.2d 908, 912 (Fed. Cir. 1984). For these reasons, we must determine whether Plaintiffs have identified a statute or provision, other than the Back Pay Act, that mandates an award of money damages.

B. The Collective Bargaining Agreement

In its Motion, the Defendant contends that this Court does not have jurisdiction over a claim to enforce a collective bargaining agreement. In this case, the Plaintiffs rely upon the ATC Pay and Reclassification Rules, which are contained in a Memorandum of Understanding between the FAA and the NATCA, entered into on July 9, 1998. Plaintiffs ask us to enforce Rule 35, which requires that certain steps be taken when transferring employees from the FG(GS) system to the ATC system, including a step increase.

The Civil Service Reform Act ("CSRA") governs the enforcement of collective bargaining agreements in federal employment. *See* 5 U.S.C. § 7101 *et seq.* It provides that negotiated grievance procedures, required to be in all CBAs, are "the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1). The Court of Appeals for the Federal Circuit has held that Congress' addition of the word "administrative" to this provision in 1994 expressed its intent to allow judicial relief for employee grievances that fall within the scope of the negotiated grievance procedures. *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002); *accord O'Connor v. United States*, 308 F.3d 1233 (Fed. Cir. 2002). That is, the CSRA was not intended to prohibit judicial remedies that were otherwise provided by law. In contrast, the Court of Appeals in *Salinas v. United States*, 323 F.3d 1047 (Fed. Cir. 2003), held that the Merit Systems Protection Board had exclusive jurisdiction over the plaintiff's grievance claim, brought pursuant to the Back Pay Act.

In *Zaccardelli v. United States*, 68 Fed. Cl. 426, 433 (2005), Judge Firestone reconciled these holdings and explained when the Court of Federal Claims has jurisdiction over claims based upon a CBA:

> When read together, *Salinas*, *Mudge*, and *O'Connor* stand for the proposition that the jurisdiction of the Court of Federal Claims over a claim covered by the CSRA depends on whether the claim involves a statutory basis for jurisdiction that is *independent of the CSRA*.

(emphasis added). In addition to a CBA and the CSRA, the cited cases involved claims pursuant to the Back Pay Act, the Prevailing Wage Systems Act, and the Fair Labor Standards Act, respectively. *See id.* at 432.

The court in *Zaccardelli* noted that the Court of Federal Claims had jurisdiction over the plaintiffs' claims in *Mudge* and *O'Connor*, but not in *Salinas*. As mentioned earlier, this Court does not have jurisdiction based solely upon the Back Pay Act. Only

the plaintiffs in *Mudge* and *O'Connor*, then, had articulated an independent, money-mandating provision (the Prevailing Wage Systems Act and the Fair Labor Standards Act, respectively).

The CBA itself is not a contract within the meaning of the Tucker Act, so the plaintiff in *Zaccardelli*, who had not identified any other money-mandating statute, had not established jurisdiction in the Court of Federal Claims. *Id.* at 433. *Zaccardelli*'s holding is consistent with our reading of the rule set forth in *Mudge* – that the CSRA does not deprive the employee of a judicial remedy for an employee grievance if jurisdiction in this Court otherwise exists. *See Mudge*, 308 F.3d at 1232 (The CSRA "no longer restricts a federal employee's right to pursue an employment grievance in court.").

One reason for the *Zaccardelli* rule is that federal employment is governed by statute, not by contract, *Adams v. United States*, 391 F.3d 1212, 1221 (Fed. Cir. 2004), so a collective bargaining agreement cannot be an independent basis to challenge a violation of federal employment. In addition, although the CSRA does not deprive a plaintiff of his right to enforce independent statutory rights in court, it does provide a comprehensive scheme of administrative review applicable to remedy adverse employment actions. *See Mudge*, 308 F.3d at 1228. The Merit Systems Protection Board's jurisdiction over those administrative claims prevents this Court from hearing suits for back pay based solely on violations of the CSRA that are covered by its administrative-review provisions. *See Salinas*, 323 F.3d at 1049; *see also Zaccardelli*, 68 Fed. Cl. at 433 (refusing to assert jurisdiction over "claims of violations of the CBA [that] are simply employee grievances, which are governed by the CBA's grievance procedures, as set forth in the CSRA").

Applying *Zaccardelli* to the current case, it is clear that this Court has jurisdiction over Plaintiffs' claims only if they identify a money-mandating provision that is independent of the CBA itself.

C. The Classification Act

In their Complaint, Plaintiffs claim jurisdiction based upon the Classification Act of 1949, 5 U.S.C. § 5101. However, the parties do not address this statute in their briefs. Section 5101 provides for "a plan for classification of positions whereby. . . the principle of equal pay for substantially equal work will be followed." *Id.* The Plaintiffs invoke this statute apparently because they were treated differently from all other air traffic controllers who were converted to the ATC pay system.

In *Testan*, the Supreme Court squarely held that the Classification Act is not a money-mandating statute that waives the Government's sovereign immunity. *Testan*, 424 U.S. at 399-400. Although it provides for a classification system of equal pay for

equal work, "none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified." *Id.*

As stated in *Testan*, it is not the case that Plaintiffs have no remedy at all – administrative relief is detailed in the Classification Act, *id.* at 403, as it is for enforcement of collective bargaining agreements in the Civil Service Reform Act, *Zaccardelli*, 68 Fed. Cl. at 433. It is only the case that employees cannot seek retroactive classification and monetary relief in this Court for violations of those statutes alone.

D. 5 U.S.C. § 5334(b)

Plaintiffs, citing 5 U.S.C. § 5334(b), claim that they are entitled to a pay increase. That statute provides in part:

> An employee who is *promoted or transferred to a position in a higher grade* is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

5 U.S.C. § 5334(b) (emphasis added). "Grade" is given the definition it has in section 5102, *see* §5331(a), which defines it as:

> includ[ing] all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to – (A) level of difficult and responsibility; and (B) level of qualification requirements of the work; to warrant their inclusion within one range of rates of basic pay *in the General Schedule*.

5 U.S.C. § 5102(a)(5) (emphasis added).

The implementing regulations define the scope of coverage as follows:

> This subpart covers employees who occupy positions classified and paid under the GS classification and pay system . . .

5 C.F.R. § 531.202. Under the regulations, "promotion" means:

> a GS employee's movement *from one GS grade to a higher GS grade* while continuously employed (including such a movement in conjunction with a transfer).

5 C.F.R. § 531.203 (emphasis added). "Transfer" means:

> a change of an employee, without a break in service of 1 full workday, from one branch of the Federal Government (executive, legislative, or judicial) to another or from one agency to another.

Id.

In examining an employee promotion from a non-GS position to a GS position, the U.S. Supreme Court held that section 5334(b) only applies to promotions *within* the GS system. *United States v. Clark*, 454 U.S. 555, 561 (1982). In *Clark*, the employees were promoted from a position in the prevailing rate wage system ("WS") to a position of a higher grade in the GS system. The Court looked to the plain language of the statute and section 5102's definition of "grade," as quoted above. That term specifically references steps in the General Schedule. The Court concluded that the plain language of the statute compels the conclusion that the two-step increase rule of section 5334(b) applies "only to promotions or transfers of employees already within the GS system." *Id.*

Plain meaning notwithstanding, the Court in *Clark* also examined the legislative history of section 5334(b) and concluded that Congress was only concerned with movement within the GS system, not movement between the GS and WS systems. *Id.* at 564. Finally, the Court analyzed a then-existing regulation, which clearly stated that the pay increase only applied to transfers or promotions within the GS system. Because "the construction of a statute by those charged with its administration is entitled to great deference," the Court concluded that the pay increase did not apply to employees transferring from another system. *Id.* at 565-66.

It was not clear whether the Supreme Court's reasoning in *Clark* also applied to the reverse situation – a promotion from the GS system to another system. The Federal Circuit has held that it did. *Libretto v. United States*, 230 Ct. Cl. 790 (1982); *Morriss v. United States*, 231 Ct. Cl. 811 (1982). The Federal Circuit in those cases clearly stated:

> It therefore follows that section 5334(b) does not apply to movement between GS and WS in either direction.

Libretto, 230 Ct. Cl. at 791; *Morriss*, 231 Ct. Cl. at 812.

Although the ATC system is distinct from the WS system, the Supreme Court's reasoning applies equally to the instant case. The plain language of section 5334(b), as well as the implementing regulations, compel the conclusion that the statute only covers promotions or transfers within the GS system. *See Clark*, 454 U.S. at 561.

Plaintiffs explicitly recognize that the Supreme Court's ruling limits section 5334's application to "transfers or promotions within the GS pay system." Pl. Br. at 25. While they claim the benefits of section 5334(b) and claim it was "violated," *id.*, they cannot escape the fact that all Level 2 through 5 ATC facilities were converted to the ATC pay system in 1998, *see* CSUF ¶ 10. Thus, Plaintiffs were transferred from the GS system to the ATC system in 1999; their transfers were not "within the GS system" as required by *Clark*.

Plaintiffs' counsel posited at oral argument that *Clark* is distinguishable from the present case. Unlike the WS system, the ATC system is essentially the same as the GS system. The Plaintiffs here did not change jobs, but were merely converted from one pay system to a new system that was, in effect, the same as the old. Plaintiffs' argument fails for two reasons. First, there are important differences between the ATC and GS pay systems, as Plaintiffs' counsel explained at oral argument. The ATC system does not contain steps within each pay band or grade, as the GS system does. Thus, an employee in a given ATC position is not subject to periodic increases in pay based on seniority.

Second, the Supreme Court's holding in *Clark* rested primarily upon the plain language of section 5334(b) and its implementing regulations – not upon the distinction between the GS and WS systems. *Clark*, 454 U.S. at 560-61. The Court's conclusion that there was "no necessary or obvious relationship" between the GS and WS systems was an additional yet unnecessary reason in support of its ruling; we do not read that as the determining rationale for the Court's holding. *See id.* at 564-65. We think the rule set forth in *Clark* is clear and must be applied in this case. *See id.* at 561 ("[T]he statute and the accompanying regulations reveal a congressional intent to apply the two-step increase provision of § 5334(b) only to promotions or transfers of employees already within the GS system.").

Plaintiffs further argue that they were entitled to a pay increase based on a grade calculation after their promotion but before they were converted to the ATC pay system. Pl. Br. at 13. They claim that section 5334(b) should have been applied to them "upon" their transfer to a new facility but "prior to" their conversion to the ATC pay system. *See* Pl. Br. at 19. This is an attempt to fall within the coverage of section 5334(b) by implying that the transfer consisted of two separate steps – first, a transfer "within" the GS system to a new facility, and second, a conversion to the new ATC system. However, they do not allege in their Complaint that their promotion in fact consisted of these two steps, or that they were ever paid under the GS system after transferring to their new ATC facilities. Their argument fails to acknowledge that the transfer to a new facility *was* a transfer into the ATC system. The new facilities had already been converted to the ATC system in October of 1998, and the FG(GS) pay system no longer existed for air traffic controllers. Their transfer was simultaneously one to a new facility and to a new pay system.

Plaintiffs do not point to any statutory provision that entitles them to a pay increase under the GS system *prior* to a transfer or promotion to the position that allegedly gives them the right to a higher rate of pay. The plain language of section 5334(b) applies upon the transfer or promotion in question, not sometime prior.

E. The Fifth Amendment

The Plaintiffs rely upon the Fifth Amendment to the U.S. Constitution in their Complaint. Although they do not specify which clause of the Fifth Amendment they refer to, they appear to be invoking the equal protection clause. *See* Complaint at ¶ 64 ("Plaintiffs were converted in a different, and unequal manner in violation of the Fifth Amendment . . .").

Neither the Fifth Amendment's due process clause, *Murray v. United States*, 817 F.2d 1580 (Fed. Cir. 1987), nor its equal protection clause, *Bounds v. United States*, 1 Cl. Ct. 215 (1983), *aff'd without op.*, 723 F.2d 68 (Fed. Cir. 1983), is a money-mandating provision within the meaning of the Tucker Act. In their brief, the Plaintiffs do not respond to the Defendant's argument that we have no jurisdiction over due process claims. Although nothing prevents the Court from hearing constitutional claims, we must properly assert jurisdiction over the complaint in the first instance. *See Terran v. Sec'y of DHHS*, 195 F.3d 1302, 1309-10 (Fed. Cir. 1999).

CONCLUSION

None of the provisions cited by the Plaintiffs is money-mandating, except section 5334(b). That provision is, however, clearly inapplicable to Plaintiffs' circumstances. Therefore, in the absence of a money-mandating provision supporting Plaintiffs' claims, we conclude we have no subject matter jurisdiction.

Defendant's Motion to Dismiss is hereby GRANTED, and Plaintiffs' Complaint is DISMISSED. Each party is to bear its own costs.

IT IS SO ORDERED.

_____
LAWRENCE M. BASKIR
Judge