

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GARY W. RIEL,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 95-351-P-DMC
)	
UNITED STATES OF AMERICA,)	
)	
<i>Defendant</i>)	

MEMORANDUM DECISION ON DEFENDANT’S MOTION TO DISMISS¹

This action arises out of alleged personnel actions taken against the plaintiff by his employer, the defendant. The plaintiff seeks back pay and attorney fees under the Back Pay Act, 5 U.S.C. § 5596, and costs and attorney fees under 28 U.S.C. § 2412. The defendant² moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to initiate and exhaust administrative remedies. For the reasons set forth below, I grant the defendant’s motion.

I. Standard for Reviewing Motion to Dismiss

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

² John Dalton, Secretary of the Navy, has responded to the plaintiff’s complaint as and for the defendant.

F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). However, when the basis of the defendant's 12(b)(1) motion is the plaintiff's alleged failure to state a federal claim, a court should assume jurisdiction and rule on the 12(b)(6) motion, unless the claim is "entirely frivolous," because "federal question jurisdiction exists once plaintiff has alleged even a colorable federal claim." *Northeast Erectors Ass'n v. Secretary of Labor*, 62 F.3d 37, 39 n.1 (1st Cir. 1995) (citing *Bell v. Hood*, 327 U.S. 678, 682-83 (1945)). Finding the plaintiff to have alleged at least a colorable federal claim, I assume that this court has jurisdiction and treat the motion as one to dismiss for failure to state a claim.

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

II. Factual Allegations

At all relevant times the plaintiff was employed by the United States of America, through the Department of the Navy, at the Portsmouth Naval Shipyard in Kittery, Maine. Complaint ¶ 3. He was issued a Notice of Proposed Removal from Government Service ("Notice of Proposed Removal") dated November 21, 1994. *Id.* ¶ 4.

On December 8, 1994 the plaintiff and his attorney made an oral reply to the Notice of

Proposed Removal. *Id.* ¶ 5. By a decision dated January 25, 1995 the proposed action was mitigated to a ten-workday suspension. *Id.* ¶ 6. The plaintiff, through and with his attorney, appealed the suspension in writing on February 9, 1995, and his grievance was denied by a decision dated March 10, 1995. *Id.* ¶¶ 7-8. The plaintiff appealed this denial to the Shipyard Commander who, as a final arbiter under the Administrative Grievance Procedure, upheld the decision to impose the suspension by a notice dated April 12, 1995. *Id.* ¶ 9.

Shortly after receiving the Notice of Proposed Removal the plaintiff was removed from his regular duties and put in Reserve Manpower. *Id.* ¶ 10. He was returned to full duty just prior to serving his ten work day suspension, in late January, 1995. *Id.* ¶ 11. While in Reserve Manpower, the plaintiff lost approximately eighty overtime hours. *Id.* ¶ 12.

III. Legal Analysis

The plaintiff asserts subject matter jurisdiction pursuant to 28 U.S.C. § 1346(a)(2) and the Back Pay Act, 5 U.S.C. § 5596. Section 1346(a)(2) does not provide an independent right of action. *Id.*; *see United States v. Testan*, 424 U.S. 392, 398 (1976). Rather, it grants the United States District Courts and the United States Court of Federal Claims concurrent jurisdiction over claims against the United States not exceeding \$10,000, when such claims are based on the Federal Constitution, Acts of Congress, executive department regulations or a contract with the United States, or when such claims seek liquidated or unliquidated damages not sounding in tort. 28 U.S.C. § 1346(a)(2). The plaintiff asserts a claim against the United States under the Back Pay Act, which provides in relevant part:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an

administrative determination . . . is found by appropriate authority³ 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 the pay, allowances, or differentials of the employee --

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable, which the employee normally would have earned or received during the period if the personnel action had not occurred . . . ; and

(ii) reasonable attorney fees related to the personnel action

5 U.S.C. § 5596(b)(1)(A). The defendant argues that the Notice of Proposed Removal does not constitute a personnel action; that the Notice of Proposed Removal did not affect the plaintiff's pay, allowances or differentials; and that the alleged mitigation from removal to suspension was not a finding under applicable law that the Notice of Proposed Removal was unjustified or unwarranted.⁴

Neither section 5596(b)(1) nor the applicable regulations define "personnel action."⁵

³ An "appropriate authority" includes the agency itself, or the Merit Systems Protection Board or United States Court of Appeals for the Federal Circuit where those entities have authority to review the agency's determination. *United States v. Fausto*, 484 U.S. 439, 454 (1988); *see also* 5 C.F.R. § 550.803 (further defining "appropriate authority").

⁴ The defendant also argues that this court is not an appropriate authority within the meaning of the Back Pay Act. However, under the Back Pay Act this court need not be an appropriate authority; rather the entity that allegedly found the personnel action to be unjustified or unwarranted must enjoy "appropriate authority" status. *See Fausto*, 484 U.S. at 154.

⁵ Congress has defined the term "personnel action" elsewhere in the United States Code applicable in each instance to specifically noted circumstances. 5 U.S.C. §§ 2302(a)(2)(A) (personnel actions by certain executive agency or Government Printing Office employees may not be based on proscribed reasons) (incorporated by reference at 5 U.S.C. §§ 2303(a) (personnel actions by certain FBI employees may not be based on proscribed reasons), 3303(a)(4) (political recommendations may not be considered in taking personnel actions regarding certain employees)); 10 U.S.C. § 1587(a)(3) (personnel actions by certain armed forces members or civilian employees of armed forces may not be based on proscribed reasons); 22 U.S.C. § 3905(a)(2) (personnel actions (continued...))

However, the statutory and regulatory bases for the Notice of Proposed Removal demonstrate that such a notice does not constitute a personnel action. An employee against whom a major adverse action (such as removal) is proposed is entitled to at least thirty days' advance written notice and a reasonable time to answer. 5 U.S.C. § 7513(b); 5 C.F.R. § 752.404(b). Thus, the Notice of Proposed Removal is merely a procedural protection rather than a personnel action within the meaning of 5 U.S.C. § 5596(b)(1).

To construe the notice as a personnel action under the Back Pay Act would, in any event, be an empty exercise. Merely issuing notice of a proposed action does not affect an employee's pay, allowances or differentials, and thus could not support a Back Bay Act claim.⁶ Although the plaintiff argues in his memorandum that he was removed from his regular duties and put in Reserve Manpower "as a result of the issuance of the Notice of Proposed Removal," Objection and Incorporated Memorandum in Response to Motion to Dismiss (Docket No. 11) at 6, he merely

⁵ (...continued)

with respect to career Foreign Service members and candidates shall be made in accordance with merit principles). Although the definition in 22 U.S.C. § 3905(a)(2)(B) includes a recommendation that a measure be taken, it cannot fairly be read as encompassing the mere issuance of notice. The other sections require some change in the employee's status, or at least a decision concerning the employee's pay, benefits or awards. 5 U.S.C. §§ 2302(a)(2)(A), 2303(a)(2), 3303(a)(4); 10 U.S.C. § 1587(a)(3).

⁶ Employees given notice of a proposed removal or suspension usually remain in a duty status in their regular position during the advance notice period. 5 C.F.R. § 752.404(b)(3). "In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may," *inter alia*, assign the employee to other duties where his or her presence no longer poses such a threat. *Id.* § 752.404(b)(3)(i). In such cases, however, any effect on the employee's pay, allowances or differentials would flow from the reassignment, not from the notice itself.

alleges that he was put in Reserve Manpower “[s]hortly after receiving” the notice, Complaint ¶ 10.⁷ Thus, the plaintiff’s Back Pay Act Claim also fails because the alleged personnel action did not adversely affect his pay, allowances or differentials.

I need not address the defendant’s remaining arguments. For the foregoing reasons, the defendant’s motion to dismiss for failure to state a claim is **GRANTED**.

Dated this 22nd day of July, 1996.

David M. Cohen
United States Magistrate Judge

⁷ Assuming, *arguendo*, that placing the plaintiff in Reserve Manpower constitutes a personnel action that adversely affected his pay, allowances or differentials, the plaintiff fails to allege that an appropriate authority found that action to be unjustified or unwarranted.

