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

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B-178149

July 9, 1973

Mr. Robert J. Canavan, General Counsel
National Association of Government Employees
285 Dorchester Avenue
Boston, Massachusetts 02127

Dear Mr. Canavan:

Reference is made to your letter of May 8, 1973, and prior correspondence concerning claim number 2-2334927 in which you, as attorney for Mr. Earl L. Owens, submit additional information and request review and reconsideration of a settlement by our Transportation and Claims Division, dated March 15, 1968. Under the settlement all wages earned from private employers by Mr. Owens during his unjustified separation were deducted from the computation of back pay with the result that no balance was due the claimant.

The record in this case reflects that the Chairman, Board of Appeals and Review, Civil Service Commission, instructed the Boston Naval Shipyard to retroactively restore Mr. Owens to his former position of boilermaker from which he had been erroneously separated on August 30, 1965. Mr. Owens returned to active duty on June 13, 1966, and he subsequently submitted a claim to his agency for back pay due him during the period August 30, 1965, to June 12, 1966. He disagreed with his agency's determination that all outside earnings should be set-off against his back pay award and his claim was referred to our Transportation and Claims Division for settlement.

In essence, Mr. Owens' position is that he performed outside employment long before his erroneous separation, that such supplemental employment was necessarily outside his regular working hours at the Naval shipyard, and therefore only pay for outside employment during the period of separation for the regular 40-hour workweek should be setoff against the back pay computation.

Restoration of an employee to his former position after cancellation of an unwarranted personnel action involves adjustments in the amount of back pay and other benefits due the employee as required by 5 U.S.C. 5596. Section 550.804(e) of title 5, Code of Federal Regulations (CFR) sets forth in part how the back pay due an employee is to be computed and provides:

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(a) In computing the amount of back pay due an employee under this section and section 5596 of title 5, United States Code, the agency shall deduct the amounts earned by the employee from other employment during the period covered by the corrected personnel action. The agency shall include as other employment only that employment engaged in by the employee to take the place of the employment from which the employee was separated by the unjustified or unwarranted personnel action.

Federal Personnel Manual Supplement 990-2, Book 550, Subchapter 8, at subparagraph f, further explains the requirement of the above regulation as follows:

f. Amount of entitlement. When an employee has been separated from his position by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his Government income should have been and the amount which he actually earned in an employment obtained to take the place of his Government employment. If the employee had been demoted by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his income should have been in the proper grade and the amount of his income in the lower grade. If the employee were already working in a part-time job at the time of his removal, suspension, or furlough from his Government employment as a result of the unjustified or unwarranted personnel action, the part-time job is not other employment within the meaning of section 5596 of title 5, United States Code, because it does not take the place of the Government employment. If the employee were able to expand his part-time job to a full-time job, or were to take a second part-time job, as a substitute for Government employment, only those hours worked on the full-time job in excess of the aggregate of the hours worked on the part-time job, or only the hours worked on the second part-time job, as the case may be, are considered as other employment in place of Government employment. In other words, the only earnings from other employment that need not be deducted from back pay are earnings from outside

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employment the employee already had before the unjustified suspension or separation. (See Comptroller General decision B-148637, dated January 29, 1968.) An agency should obtain a statement or affidavit from the employee covering his outside earnings.

You have supplied information concerning Mr. Owens' non-Government employment history from January 1964 through June 1966 which includes the separation and the period preceding it. Mr. Owens' employment record for this time frame is summarized as follows:

| <u>Employer</u> | <u>Earnings During Quarter</u> | | | | |
|---|--------------------------------|---------------------------|------------------------|----------------------------|------------------------------|
| | <u>Year</u> | <u>January- March</u> | <u>April- June</u> | <u>July- September</u> | <u>October- December</u> |
| McNeil Maintenance Co., Malden, Mass. | 1964 | | \$449.00 | \$143.30 | - |
| | 1966 | \$1,311.25 | 610.00 | - | - |
| Daniel Weisberg Roxbury, Mass. | 1965 | - | 550.00 | 450.00 | - |
| H. C. Burke Co. Boston, Mass. | 1965 | - | - | 1,691.25 | - |
| General Ship & Engine Works Inc. East Boston, Mass. | 1966 | 1,327.56 | - | - | - |

The foregoing reveals that Mr. Owens engaged in outside part-time employment prior to the time he received notice of his impending separation. It is therefore apparent that under the above-quoted regulation and instructions all outside earnings should not have been deducted from the back pay.

Mr. Owens' record of overtime work during the period of separation is as follows:

| <u>Employer</u> | <u>Hours exceeding normal workweek</u> | <u>Wages</u> |
|----------------------------------|--|-------------------|
| McNeil Maintenance Co. | 195 | \$680.50 |
| H. C. Burke Co. | 97.25 | 320.93 |
| General Ship & Engine Works Inc. | 124.90 | 368.52 |
| | Total | <u>\$1,369.95</u> |

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In view of the information now of record, it is our view that the above amount should not have been deducted from the back pay. Accordingly, a settlement will be issued in Mr. Owens' favor by our Transportation and Claims Division on the basis of the foregoing.

Sincerely yours,

Paul G. Danblin

Acting Comptroller General
of the United States

cc: Boston Naval Shipyard
Department of the Navy
Boston, Massachusetts