



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

B-148637

January 29, 1968

Dear Mr. Macy:

We refer to your letter of November 22, 1967, asking whether we see any objection to a proposed Federal Personnel Manual letter to clarify the application of section 550.804(e) of the Commission's regulations as it relates to the effect of overtime compensation earned in other employment in the computation of back pay.

The proposed clarification reads as follows:

"(e) In computing the amount of back pay due an employee under this section and section 3 of the Act, the department shall deduct the amounts earned by the employee from other employment during the period covered by the corrected personnel action. The department 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."

The intention of the proposal is to provide for the reduction of the back pay otherwise due an employee who is restored following an unwarranted personnel action by only those amounts that were earned through outside employment during the period of time corresponding with the period the employee would have worked in his Government position had he not undergone such unwarranted personnel action.

5 U.S.C. 5596 provides that the back pay otherwise due an employee incident to the correction of an unwarranted personnel action shall be reduced by "any amounts earned by him through other employment during that period" (the period during which the unwarranted personnel action was in effect). Similarly, section 6(b) of the act of August 24, 1912, as amended, 5 U.S.C. 652(b), which was repealed by section 5 of Public Law 89-380, the applicable provisions of which are now embodied in 5 U.S.C. 5596, provided for reducing the back pay due by "any amounts earned by him through other employment during such period".

In construing the earlier statute our decisions consistently have held that the earnings from other employment that are to be excluded from consideration in determining by what amount the back pay otherwise due should be reduced are those earnings which are attributable to outside employment in which the employee was engaged concurrently with his

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Government employment prior to the unwarranted suspension or separation. That is to say, only that amount which the employee would have earned through other employment if he had not been suspended or separated properly may be excluded from the aggregate amount earned through other employment.

In our opinion the provisions currently appearing in 5 U.S.C. 5596 should not be construed differently from the similar provisions contained in the former section 6(b) of the act of August 24, 1912, as amended. Accordingly, we do not believe it to be legally proper to implement your present regulations for the purposes indicated in your letter.

Sincerely yours,

FRANK H. WEITZEL

Assistant Comptroller General
of the United States

The Honorable John W. Macy, Jr., Chairman
United States Civil Service Commission