

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

FILE: B-175275.14

DATE: JUN 20 1975

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MATTER OF: Gerald Owen - Backpay for overtime assignment denied
in violation of labor-management agreement

DIGEST: Naval Ordnance Station and employee's union ask whether it is legal to pay employee backpay because he was denied overtime assignment in violation of a labor-management agreement. Agency violations of labor-management agreements which directly result in loss of pay, allowances, or differentials, are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act. Backpay is payable even though the improper agency action is one of omission rather than commission. Therefore, an employee improperly denied overtime work may be awarded backpay. B-175867, June 19, 1972, applying the "no work, no pay" overtime rule to Back Pay Act cases will no longer be followed.

This is a joint request for an advance decision received from Captain W. C. Klemm, USN, Commanding Officer, Naval Ordnance Station, Louisville, Kentucky, and from Mr. James W. Seidl, President, Local Lodge 830, International Association of Machinists and Aerospace Workers (IAM & AW), as to whether the Department of the Navy may pay backpay to Mr. Gerald Owen, an employee of the Naval Ordnance Station, because he was denied an overtime assignment in violation of the basic agreement between the Naval Ordnance Station and Local Lodge 830. Normally, formal decisions on such matters would be rendered only on the request of the head of the agency or the head of the national union involved. However, in view of the importance of the matter and its Government-wide application, we are treating the request as if it had been made by the Secretary of the Navy or the head of the IAM & AW.

Captain Klemm's and Mr. Seidl's joint submission shows that on Saturday, November 23, 1974, and on Sunday, November 24, 1974, Mr. Gerald Owen was denied an overtime assignment in violation of the terms of a labor-management agreement between the Naval Ordnance Station, Louisville, and Local Lodge 830, IAM & AW. The union filed a grievance on Mr. Owen's behalf but the Naval Ordnance Station refused to pay Mr. Owen for the overtime assignments even though it agreed that Mr. Owen would have been assigned to perform the overtime if the labor-management agreement had not been violated.

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The Naval Ordnance Station states its willingness to pay Mr. Owen for the overtime assignments if it is determined that such payment would be legal. The Naval Ordnance Station maintains, however, that there is no authority under the Back Pay Act, 5 U.S.C. § 5596 (1970), to pay Mr. Owen for overtime work he did not actually perform. The Naval Ordnance Station relies on Decision of the Federal Labor Relations Council (FLRC) No. 73A-46, September 24, 1974, in which the FLRC stated that the law precludes an employee from receiving overtime pay where no work has been performed by the employee. The union, on the other hand, believes that Comptroller General decisions 54 Comp. Gen. 312 (B-180010, October 31, 1974) and 54 Comp. Gen. 403 (B-181069, November 20, 1974) lead to the conclusion that backpay is allowable in this case.

The Naval Ordnance Station and the union agree that management violated the labor-management agreement. There is no dispute over the facts in the case or the interpretation of the labor-management agreement. The dispute is solely over the legality of the backpay remedy for the admitted violation of the labor-management agreement.

The above-cited FLRC decision, No. 73A-46, September 24, 1974, was based on several previous Comptroller General decisions which had held that since the authority for payment of overtime compensation contemplates the actual performance of duty during the overtime period, an employee who had not performed the overtime could not be entitled to overtime pay. 42 Comp. Gen. 195 (1962); 46 *id.* 217 (1966); 47 *id.* 358, 359 (1968). With respect to the "no work, no pay" policy, we held in our older decisions that the withdrawal or reduction in pay referred to in the Back Pay Act, now codified in 5 U.S.C. § 5596 (1970), meant the actual withdrawal or reduction of pay or allowances which the employee had previously received or was entitled to. These holdings were subsequently applied in B-175867, June 19, 1972, where the employee involved was deprived of the opportunity to work overtime by failure to comply with a union agreement. In essence such application of the "no work, no pay" rule was made because the improper personnel action was one of omission. We stated in B-175867, June 19, 1972, *supra*, that the improper denial of the opportunity to perform overtime to the aggrieved employee was not an unjustified or unwarranted personnel action under 5 U.S.C. § 5596.

Section 5596 of 5 United States Code, the authority under which an agency may retroactively adjust an employee's compensation, provides, in part, as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation."

The criteria for an unjustified or unwarranted personnel action are set forth in 5 C.F.R. §§ 550.803(d) and (e) (1974) which provide:

"(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

"(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter."

We have in our more recent cases held that a violation of a mandatory provision in a labor-management agreement which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, as long as the provision was properly included in the agreement. Accordingly, the Back Pay Act, 5 U.S.C. § 5596 (1970), is the appropriate statutory authority for compensating the employee for pay, allowances or differentials he would have received but for the violation of the collective bargaining agreement. 54 Comp. Gen. 312 (1974) and 54 *id.* 435 (1974). Thus, if an agency bargains away its right to exercise its discretion on a matter that is normally discretionary with the agency, the agency is bound by the nondiscretionary policy expressed in the labor-management agreement just as it would be bound by its own mandatory regulations.

As previously mentioned, in our early decisions, even when overtime was not involved, we held that the omission or failure to take action for an improper reason did not entitle the employee to backpay. Thus, where an employee was denied a promotion for an improper reason, it was held that the employee was not entitled to backpay. See 48 Comp. Gen. 502 (1969). (Compare 50 Comp. Gen. 581 (1971) where it was held that an employee who performed the duties of a GS-11 position, but was appointed to a GS-9 position because of racial or sex discrimination, was entitled to backpay because the employee was deliberately misclassified in violation of law and regulations.)

We have since reexamined our prior position that omission or failure to take action for an improper reason did not entitle the employee to backpay. In 54 Comp. Gen. 312 (1974), *supra*, and 54 *id.* 403 (1974) we overruled our previous decisions that held that omission or failure to promote for an improper reason could not be

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the basis for an award of backpay. In those cases we held that failure to timely promote in violation of a labor-management agreement could be considered an unjustified or unwarranted personnel action and that an employee could be awarded a retroactive promotion with backpay upon a finding by the appropriate authority that the employee had undergone an unjustified or unwarranted personnel action and, that but for such improper action, would have been promoted at a prior date. More recently we held that a finding by appropriate authority, which may be the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR), that an employee has undergone an unjustified or unwarranted personnel action as a result of an unfair labor practice and that such action resulted directly in depriving the employee of pay and allowances he would otherwise have received but for such action, would entitle the employee to backpay. See B-180010, March 19, 1975, 54 Comp. Gen. ___.

It is now our view, therefore, that an unjustified personnel action may involve acts of omission as well as commission, whether such acts involve a failure to promote in timely fashion or a failure to afford an opportunity for overtime work in accordance with requirements of agency regulations or a collective bargaining agreement. Therefore, under the Back Pay Act, an agency may retroactively grant backpay, allowances, and differentials to an employee where he has undergone an unjustified or unwarranted personnel action, even though such action was one of omission rather than one of commission.

In the instant case the employee was deprived of overtime work in violation of a labor-management agreement--an act of omission. If the agency had not improperly assigned the work, the employee would have worked and received overtime compensation. In view of this and our decisions holding that an act of omission may form the basis of an award for backpay, we now hold that the employee may be awarded backpay for the overtime lost under the provisions of the Back Pay Act. Our decision B-175867, June 19, 1972, will no longer be followed. Of course the amount of payment must be determined by appropriate authority and an award made in accordance with the provisions of 5 U.S.C. § 5596 and implementing regulations.

R.F. KELLER

Acting

Comptroller General
of the United States