

DECISION



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

12127

PLM-1
Mr. Rissler

FILE: B-196680

DATE: November 27, 1979

MATTER OF: Attorney Fees - Authority of Special Counsel, MSPB

- DIGEST:**
1. The Special Counsel of the Merit Systems Protection Board is not an "appropriate authority" with power to award attorney fees under the Back Pay Act, as amended, 5 U.S.C. § 5596. However, the Special Counsel may include a recommendation to pay reasonable attorney fees in his recommendation for corrective action to be taken by an agency under 5 U.S.C. § 5596.
 2. The Special Counsel of the Merit Systems Protection Board may not recommend the payment of attorney fees in those cases where the corrective action recommended is outside the purview of the Back Pay Act, absent some other statutory authority authorizing the complainant employee's agency to award attorney fees.

DLG 2541

By letter of November 2, 1979, H. Patrick Swygert, the Special Counsel of the Merit Systems Protection Board, has requested our opinion as to the authority of the Special Counsel to recommend payment of reasonable attorney fees under the Back Pay Act, 5 U.S.C. § 5596. That section provides, in part, as follows:

"(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) 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 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--

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"(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title; * * *."

Specifically, four questions are presented by Mr. Swygert. The first two are:

"1. Is the Special Counsel an 'appropriate authority' within the meaning of section 5596? In this connection, we note that regulations of the Office of Personnel Management define the 'appropriate authority' referred to in 5 U.S.C. 5596 to include 'the Merit Systems Protection Board, including the Special Counsel,' 5 CFR 550.803(d)(7), as amended, 44 FR 48954 (August 21, 1979).

"2. Is a determination by the Special Counsel 'that there are reasonable grounds to believe that a prohibited personnel practice has occurred . . . which requires corrective action' by an agency (5 U.S.C. 1206(c)(1)(A)) an 'administrative determination . . . found by appropriate authority' within the meaning of 5 U.S.C. 5596(b)(1)? In other words, may the Special Counsel include, as part of the corrective action recommended to an agency, the payment of reasonable attorney fees to a complainant employee or applicant?"

Under 5 U.S.C. § 1206, as added by section 202 of the Civil Service Reform Act of 1978, Public Law No. 95-454, 92 Stat. 1125, October 13, 1978, the Special Counsel is given various responsibilities with the authority to recommend corrective action to the agency concerned or to the Merit Systems Protection Board, as appropriate. The statute does not vest the Special Counsel with power to order corrective action. As Mr. Swygert has pointed out present regulations of the Office of Personnel

Management define "appropriate authority" under 5 U.S.C. § 5596 to include "the Merit Systems Protection Board, including the Special Counsel," but it is not clear whether these regulations were intended to make the Special Counsel an appropriate authority independent of the Board. We understand, however, that the Office of Personnel Management anticipates publication in the near future of a proposed amendment which will delete "including the Special Counsel" from the appropriate authority provision of the backpay regulations. In any event, since the Special Counsel can only determine that there are reasonable grounds to believe, not find, that an improper action has occurred and since he can only recommend, not order, corrective action, we believe that the Civil Service Reform Act did not confer "appropriate authority" status under 5 U.S.C. § 5596 upon the Special Counsel.

We further believe that the authority given to the Special Counsel under 5 U.S.C. § 1206(c)(1)(A)--to recommend corrective action when he finds that there are reasonable grounds to believe that a prohibited personnel practice has occurred--includes the right to recommend to an agency that reasonable attorney fees be awarded to the complainant employee if the matter is within the purview of 5 U.S.C. § 5596. It is immaterial for that purpose that the Special Counsel is not deemed to be an appropriate authority. The Back Pay Act, however, does not extend to applicants for employment. Therefore, a recommendation for attorney fees by the Special Counsel in such cases would not be appropriate.

The third question is:

"3. If the answers to 1 and 2 are in the affirmative, may the Special Counsel recommend as part of the corrective action that an agency pay attorneys' fees in a case where the prohibited personnel action has not resulted in withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee, such as in a case of geographic lateral reassignment of an employee in reprisal for whistleblowing or exercise of an appeal right? If so, with what qualifications, if any?"

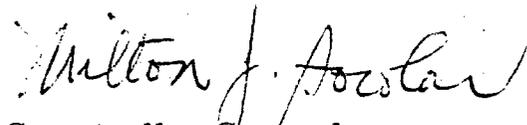
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When a prohibited personnel practice has not resulted in loss of pay, allowances, or differentials, and thus is outside the purview of 5 U.S.C. § 5596, we find that the Special Counsel is without authority to recommend attorney fees as a part of the corrective action. The Special Counsel may only make such a recommendation where there exists an authority whereby the agency vested with power to take or order corrective action is authorized to award attorney fees.

The fourth question is:

"4. May reasonable attorneys' fees be paid by an agency in settling a complaint pending with the Special Counsel, where the settlement obviates any formal recommendation by the Special Counsel to the agency for corrective action? That is, may such fees be paid on the basis of the agency's determination or acknowledgement of an unjustified or unwarranted personnel action before or without issuance of formal findings and recommendations by the Special Counsel?"

If the complainant employee's agency makes a determination that there has been an unjustified personnel action requiring corrective action under 5 U.S.C. § 5596, we see no objection to the agency authorizing payment of reasonable attorney fees, otherwise allowable under that authority, notwithstanding the complaint is pending with the Special Counsel. In such case, the issuance of formal findings and recommendations by the Special Counsel for corrective action is unnecessary.



For The Comptroller General
of the United States