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DECISION



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

FILE: B-208480, B-208481

DATE: March 28, 1983

MATTER OF: Leverett C. Burke and James E. Mole -
Statute of Limitations - Backpay

DIGEST:

Two employees were awarded backpay pursuant to a December 10, 1973, ruling by the Board of Appeals and Review of the Civil Service Commission that they had involuntarily resigned from their positions in 1972. The employees' claims that overtime earnings were improperly deducted from their backpay awards were received in this Office on June 16 and July 14, 1980. The claims may not be allowed since they accrued on December 10, 1973, the date of the Board's determination, and 31 U.S.C. § 71a (1976) bars consideration of claims received in this Office more than 6 years after the date the claim first accrues.

This action is in response to a letter from the law firm of Shein and Brookman, on behalf of two employees of the U.S. Customs Service, appealing our Claims Group's settlements, which determined that the employees' overtime earnings during the period of an improper personnel action must be deducted from Federal backpay. We hold that the employees' claims are barred by the 6-year statute of limitations stated in 31 U.S.C. § 71a (1976).

Messrs. Leverett C. Burke and James E. Mole resigned from their positions as Customs Patrol Officers on March 22 and March 23, 1972, respectively. On December 10, 1973, the Board of Appeals and Review of the Civil Service Commission (now Office of Personnel Management) determined that the employees' resignations were involuntary, and ordered that the employees be reinstated to their positions. The employees were reinstated retroactively on December 27, 1973. Each employee was awarded backpay under the Back Pay Act, 5 U.S.C. § 5596 (1976), beginning on the date of his involuntary resignation and terminating on the date of his reinstatement.

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Although the employees questioned the agency's computation of backpay, charging that Customs improperly deducted interim earnings attributable to overtime work, Messrs. Mole and Burke did not file claims with our Office until June 16 and July 14, 1980, respectively. Our Claims Group denied the employees' requests for recomputation of backpay, holding that the overtime earnings were properly deducted since the employees failed to show that they were engaged in outside work prior to the improper personnel action.

On appeal, Messrs. Burke and Mole maintain that the overtime earnings should not have been deducted from backpay since these earnings were for work performed outside of their regular hours of employment with the Government. In support of this position, the employees cite the U.S. District Court's decision in Payne v. Panama Canal Company, 428 F. Supp. 997 (D.C.C.Z. 1977), reversed on other grounds, 607 F.2d 155 (5th Cir. 1979), holding that only compensation earned by an employee during a 40-hour workweek may be offset against backpay.

The substantive merits of the claims are irrelevant, however, because we find that the claims are time-barred under the statute of limitations stated in 31 U.S.C. § 71a (1976), now 31 U.S.C. § 3702(b), as codified by Public Law 97-258, September 13, 1982, 96 Stat. 877. Section 71a provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in our Office within 6 years after the date it first accrued or be forever barred.

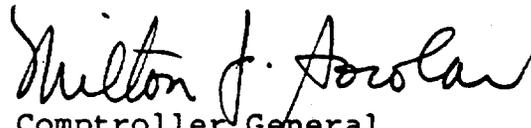
Following an established line of court decisions, our Office has recognized two categories of backpay claims for purposes of applying the 6-year limitations period stated in 31 U.S.C. § 71a. In the first category are backpay claims which are payable at the time the employee performs services for which compensation is denied; there is no other condition precedent to payment of the claim, such as an administrative body's factual or legal determination that the employee is entitled to backpay. Claims in the first category accrue at the time the work is performed, and the 6-year barring act begins to run at that time. See 58 Comp. Gen. 3 (1978). See generally Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962).

Backpay claims in the second category are those based on statutes which require an administrative determination of the validity of the backpay claim in order for the claim to be payable. In these cases, the employee's statutory claim for backpay is not established until the designated agency has acted or declined to act, and the claim accrues as a whole on the date of the administrative determination. Ralph C. Harbin, B-201633, October 29, 1981, 61 Comp. Gen. 57. See also Friedman v. United States, cited above; Feldman v. United States, 181 F.Supp. 393 (Ct. Cl. 1960).

Within the latter category are claims based on the Back Pay Act, 5 U.S.C. § 5596, the provisions of which authorize backpay for an employee who is found by an "appropriate authority" to have undergone an unjustified or unwarranted personnel action resulting in the withdrawal or reduction of pay or allowances. See Ralph C. Harbin, above. Under implementing regulations set forth at 5 C.F.R. § 550.803(c) (1973), in effect at the time the Board of Appeals and Review determined that Messrs. Burke's and Mole's resignations were involuntary, the term "appropriate authority" included the Civil Service Commission, of which the Board of Appeals and Review was a part.

As indicated previously, the Board of Appeals and Review decided on December 10, 1973, that Messrs. Burke and Mole had involuntarily resigned from their positions and were entitled to reinstatement with backpay. On that date, the two employees' claims for backpay accrued as a whole. Since their claims for recomputation of backpay were received in this Office on June 16 and July 14, 1980, more than 6 years from the date they first accrued, they are barred by the above-cited Act and may not be considered by this Office. Although the claims may have been submitted to Customs at an earlier date, we have consistently held that the filing of a claim with the administrative agency concerned does not toll the running of the statute. James W. Gregory, B-201936, April 21, 1981.

Accordingly, on this basis, the claims are denied.



Acting Comptroller General
of the United States