

DECISION

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

FILE: B-208097

DATE: December 7, 1983

MATTER OF: Glen Gurwit - Backpay - State Unemployment Compensation

DIGEST:

The Commissioner of Customs asks whether unemployment compensation paid by a State to a Federal civilian employee during a period of wrongful separation may be deducted from a subsequent backpay award under 5 U.S.C. § 5596. Under the law providing Unemployment Compensation for Federal Employees (5 U.S.C. §§ 8501, et seq.) and Department of Labor regulations (20 C.F.R. Part 609), overpayments of unemployment compensation are to be determined and recovered under the applicable State's law. Since unemployment compensation received from a State by a Federal employee during a period of wrongful separation may be required to be refunded to the State, no deduction should be made from the backpay award.

Mr. Alfred R. DeAngelus, the Acting Commissioner of Customs, requests a decision as to whether unemployment compensation paid by a State to a Federal Government employee during a period in which he was removed from Government employment may be deducted from a subsequent backpay award to which the employee has been found to be entitled following an appeal of the removal. Under the current regulations, we conclude that, since unemployment compensation received from a State by an employee during a period of unjustified or unwarranted separation from the Federal service may be required to be refunded to the State, no deduction should be made by the Federal agency from the backpay to which the employee is otherwise entitled.

BACKGROUND

In December 1980, Mr. Glen Gurwit was removed from the U.S. Customs Service for disciplinary reasons. Mr. Gurwit filed a grievance in connection with his removal and the issue of whether his removal was for the efficiency of the Service was submitted to arbitration pursuant to the

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National Agreement between the U.S. Customs Service and the National Treasury Employees Union. In November 1981, the arbitrator issued an award ordering that Mr. Gurwit be reinstated with backpay. There was no appeal from the arbitrator's award, and the only question that remains is the amount of the award under the Back Pay Act of 1966, 5 U.S.C. § 5596.

During the time that Mr. Gurwit was separated from the Customs Service, he received unemployment compensation benefits from the State of Vermont. It is the Service's position that in computing a backpay award, state unemployment compensation received by an employee during the period of the wrongful removal should be regarded as earnings of the employee entitling a Federal agency to deduct that amount from the backpay award. The agency would be responsible for determining the amount of the duplicate unemployment compensation payments and deduct them from the total amount of the backpay award. The Customs Service believes that this position is consistent with the letter and spirit of the Back Pay Act of 1966, 5 U.S.C. § 5596, and would result in significant savings to the Federal Government in the future.

INTERIM BENEFITS AND
BACKPAY AWARDS GENERALLY

Generally, the Back Pay Act, 5 U.S.C. § 5596 (1976), provides that a Federal employee found to have undergone an unjustified or unwarranted personnel action is entitled upon correction of the action to recover the amount he would have earned during that period as if the personnel action had not occurred, less any amounts earned by him through other employment. The Act further provides that for all purposes the employee is deemed to have performed services for the agency during that period. Section 5596 entitles an employee to the pay he normally would have earned during the period of the improper action as if he had performed services for the agency during that period. The statute requires the agency to make the employee whole, Ciambelli v. United States, 203 Ct. Cl. 680, 687 (1974), but recovery is limited to compensation lost, Seebach v. United States, 182 Ct. Cl. 342, 353 (1968).

Under 5 U.S.C. § 5596(c), the Office of Personnel Management shall prescribe regulations to carry out the Back Pay Act. The implementing backpay regulations, 5 C.F.R. § 550.805 (1983), provide that the employing agency shall recompute the employee's pay for the period of the corrective action as if the improper personnel action had not

occurred, but no employee shall be granted more pay than he would have been entitled to receive if the improper personnel action had not occurred. Further guidance is contained in Federal Personnel Manual Supplement 990-2, Book 550, Subchapter S8.

Any deduction from backpay must be based on the nature of the outside benefits in each situation. See for example, 57 Comp. Gen. 464 (1978), requiring the offset of the amount received as severance pay from the computation of a backpay award; and see B-195213, July 7, 1980, requiring that the amount received for disability compensation be deducted from the computation of the backpay award. Here, in the Gurwit case, we must address the status of unemployment compensation benefits paid by a State to the employee.

UNEMPLOYMENT COMPENSATION
FOR FEDERAL EMPLOYEES

Since January 1, 1955, Federal civilian employees have had unemployment insurance protection under Chapter 85, Title 5, of the United States Code. In addition, Public Law 96-499, the Omnibus Reconciliation Act of December 5, 1980, requires each Federal agency to pay the costs of all state unemployment benefits to eligible former employees. The Department of Labor, through its Employment and Training Administration's Unemployment Insurance Service, is responsible for (1) developing administrative procedures and forms for State and Federal agencies to use and (2) advising State offices and Federal agencies of their responsibilities under the law. The Secretary of Labor has entered into agreements with all 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands. Under these agreements, States are required to pay unemployment compensation to former Federal employees in the same amount and under the same terms and conditions of the paying States' laws that apply to unemployed private industry claimants. Generally, the paying State will be the one in which the claimant's last official duty station was located.

In making such payments to Federal employees, the state agency receives a 100 percent contribution from a fund administered by the Department of Labor. 5 U.S.C. § 8505 (1976). The Department of Labor certifies payments from this fund to the state agency on a quarterly basis, based on estimates of the amount which should be necessary for the upcoming quarter and adjusting that amount according to any

underpayment or overpayment made in the previous quarter. Monies are deposited into the fund by each employing Federal agency in an amount equal to the payments of unemployment compensation benefits made to employees of that agency, such deposits also being determined quarterly on the basis of estimates for the upcoming quarter. See 5 U.S.C. § 8509 (Supp. IV 1980).

All States require that, to receive payments, a claimant must be unemployed from lack of work and be able and available for work. State unemployment compensation laws and policies vary regarding eligibility requirements, payment amounts, and duration of payments. For a comprehensive review of unemployment compensation under Vermont State law, see Vermont Statutes Annotated, title 21, Chapter 17 (1978).

Under 5 U.S.C. § 8502(b) (1976), a State agency, acting as the agent of the United States shall pay unemployment compensation benefits to a qualifying claimant in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to the claimant if the Federal service and Federal wages had been included as employment and wages under that State's law. Under 5 U.S.C. § 8502(d), a determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.

Under 5 U.S.C. § 8508, the Secretary of Labor may prescribe regulations necessary to carry out the law providing Unemployment Compensation for Federal Employees (5 U.S.C. §§ 8501 et seq.). That provision of law also charges the Secretary, insofar as practicable, to consult with representatives of State unemployment compensation agencies before prescribing rules which may affect the performance by the State agencies of functions under agreements under the law. The Secretary of Labor's regulations implementing the law are contained in Part 609 of Title 20, Code of Federal Regulations (1982). Under 20 C.F.R. § 609.21 (1982), determinations of whether there have been overpayments, and whether they shall be recovered or waived, and the methods of recovery, are in all respects committed to the State agencies for action in accordance with that State's unemployment compensation law. Moreover, appeal and review of State agency determinations are also committed to resolution under State laws. See 20 C.F.R. § 609.25 (1982).

UNEMPLOYMENT COMPENSATION
AND BACKPAY AWARDS

As emphasized above, individual states are required to pay unemployment compensation benefits to former Federal civilian employees in the same amount and under the same terms and conditions of the paying State's laws as apply to unemployed private industry claimants. In addition, overpayments of unemployment compensation shall be determined and recovered or waived in accordance with the provisions of the applicable State unemployment compensation law.

Recognizing these State initiatives, decisions of this Office have consistently held that, where applicable state law may require refund of unemployment compensation, a Federal agency should not deduct unemployment compensation received during the corresponding period from a backpay award. In 35 Comp. Gen. 241 (1955), unemployment compensation was received from the State of Oklahoma by a postal service employee. Since the employee might have been required to refund the unemployment compensation to the Oklahoma Employment Security Commission, we determined that no deduction from the backpay should be made. This holding was extended to cover a former member of the military service in 50 Comp. Gen. 180 (1970). And, in B-189198, August 25, 1977, we advised the Community Service Administration by letter that unemployment compensation received from the District of Columbia should not be deducted from a backpay award to an employee. The letter relied upon Federal Personnel Manual Supplement 990-2, Book 550, subchapter S8-5f and S8-5i (now subchapter S8-6(4)), which provides as follows:

"(4) Unemployment compensation. Unemployment compensation received from a State by an employee during a period of unjustified or unwarranted separation from the Federal service may be required to be refunded by the State and therefore, no deduction should be made from the back pay to which the employee is otherwise entitled on restoration."

OPINIONS OF REGULATORS

In furtherance of our deliberations, we requested the views of both the Office of Personnel Management and the

Department of Labor on the withholding of unemployment compensation from a Federal backpay award. The Department of Labor's Administrator, Office of Employment Security, concluded that backpay constitutes wages, but unemployment compensation does not constitute wages and is not the equivalent of wages under Federal court decisions. He concluded, therefore, that under current Federal law a Federal agency may not lawfully deduct from an award of backpay an amount equal to the unemployment compensation paid.

Taking a contrary position, the General Counsel, Office of Personnel Management, responded that under backpay regulations at section 550.803 of Title 5, Code of Federal Regulations, the term "pay, allowances, and differentials" is defined as "* * * monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function." Based on this definition, the General Counsel concluded that unemployment compensation payments are employment benefits directly resulting from the loss of Federal employment. As such, unemployment compensation payments should be withheld from backpay awards to assure recoupment of erroneous payments to Federal employees who are subsequently reinstated with backpay.

OPINION

Department of Labor regulations on unemployment compensation for former Federal civilian employees, discussed above, do not specifically address the assessment of contingent liability to make a refund in instances where an employee receives unemployment benefits during a period for which restoration and backpay are subsequently awarded. Nor do Office of Personnel Management regulations governing backpay provide any specific guidance on the treatment of unemployment compensation paid by States. However, as stated above, the Federal Personnel Manual clearly states that unemployment compensation is not to be deducted from backpay, citing 35 Comp. Gen. 241.

What remains from the responses received from the duly authorized regulators of unemployment compensation (DOL) and Federal backpay (OPM) is a dichotomy in the approach to the issue of whether State unemployment compensation payments should be offset by a Federal agency from a backpay award. We recognize OPM's concern that there may be instances in which a State does not effect recovery of the unemployment

compensation and as a result the employee stands to be unjustly enriched. This would be the result where the State does not receive notice of the Federal agency's backpay award, where State law specifically excludes unemployment compensation from the definition of wages or earnings to be offset, where a State's statutory limitations period bars recovery of the compensation, or where the particular State might otherwise encounter administrative difficulty in identifying and collecting back the compensation. We would point out, on the other hand, that the unemployment compensation statute and the Department of Labor regulations grant to the States the right to determine when and how to recover overpayments of unemployment compensation paid to Federal employees. Hence, we do not believe that these potential difficulties in a given case provide a legal basis for us to overturn our prior decisions against deducting unemployment compensation from backpay.

Rather, in view of the existing conflict between the agencies charged with regulating the unemployment and backpay laws, we believe that the impetus for any change in the existing law should result from initiatives coordinated through the Department of Labor and the Office of Personnel Management. Thus, in the absence of statutory amendment, revised regulations, or reformation of existing Federal-state agreements on the issue, the procedures available for recoupment of unemployment benefits in the circumstances of Mr. Gurwit's case require deference to individual State initiatives. Therefore, until such change occurs, we will continue to follow our holdings that, since unemployment compensation received from a State by an employee during a period of unjustified or unwarranted separation from the Federal service may be required to be refunded by the State, no deduction should be made by the Federal agency from the backpay to which an employee is otherwise entitled on restoration.

Whether and in what manner Mr. Gurwit must repay to the State of Vermont all or any portion of the amount of unemployment compensation he received during the period covered by the Federal backpay award must be resolved under that State's laws by those, such as the Commissioner of Employment Security and the Attorney General, entrusted with their enforcement. Accordingly, the Customs Service may not make any deduction from the backpay award on account of unemployment compensation paid by the State of Vermont to Mr. Gurwit.

for 
 Comptroller General
 of the United States