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The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Jeffrey Kassel - Backpay - Computations and  
Deductions  
File: B-220734  
Date: September 24, 1986

### DIGEST

1. Unemployment compensation benefits must be deducted from backpay awards where state law requires employer, rather than employee, to reimburse the state for overpayments and where appropriate state agency has determined that an overpayment has occurred and has notified employing agency. Here, state agency determined that, since employee would receive backpay for period covered by unemployment compensation, he had been overpaid, and it so notified Veterans Administration (VA). The VA properly deducted the overpayment from backpay. Absent such a state determination and requirement, unemployment compensation should not be deducted from backpay. Glen Gurwit, 63 Comp. Gen. 99 (1983), modified.
2. Agency properly deducted from backpay an amount representing the lump-sum annual leave payment made to employee when he was removed. Lump-sum leave payments must be offset from backpay awards. Vincent T. Oliver, 59 Comp. Gen. 395 (1980). Waiver is denied because deduction of this amount did not result in a net indebtedness.
3. The agency's action in offsetting refunded retirement contributions from an employee's backpay award is consistent with Federal Personnel Manual requirements which were sustained in our decision in Angel F. Rivera, 64 Comp. Gen. 86 (1984). Therefore, we will not disturb the agency's action, although the issue of whether refunded retirement contributions are deductible from a backpay award is now in litigation.
4. Employee requests waiver of collection of several items offset from backpay, but waiver may be granted only to the extent there has been a net overpayment. The backpay computations were complex and subject to many revisions and corrections and the agency did make an overpayment. The overpayment is largely attributable to unemployment compensation. The employee relied upon published authority providing that unemployment benefits should not be offset from backpay, and he could not be expected to know how the impact of state law would alter the agency's determination on this issue.

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The agency found no evidence of fraud, misrepresentation, or lack of good faith. In these circumstances, it would be against equity and good conscience to collect the net overpayment; therefore, the net overpayment is waived.

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## DECISION

This is an appeal by Dr. Jeffrey Kassel from the settlement of our Claims Group which affirmed the deductions made by the Veterans Administration (VA) from Dr. Kassel's backpay award and denied waiver. We hold that state unemployment benefits must be offset from backpay where the state agency has notified the employing agency that there has been an overpayment of unemployment compensation and state law requires the employer to reimburse the state for overpayments. We also hold that the Veterans Administration correctly deducted the lump-sum annual leave payment from the backpay award. No waiver is granted of the lump-sum leave payment because there is no net indebtedness owed in this regard. The VA's deduction of refunded retirement contributions from the employee's backpay is consistent with Federal Personnel Manual requirements which were sustained in a recent Comptroller General decision. Finally, we grant waiver of the net overpayment received by Dr. Kassel.

## FACTS

Dr. Jeffrey Kassel was employed as a clinical psychologist at the Veterans Administration Medical Center in Manchester, New Hampshire. He was removed from his position on November 4, 1982. He grieved his dismissal under the collective bargaining agreement in effect between the VA and the National Association of Government Employees and the grievance was submitted to arbitration. On August 15, 1983, Arbitrator Jerome J. Judge issued an award ordering, in pertinent part, reinstatement of Dr. Kassel without loss of pay or benefits. Dr. Kassel was reinstated on May 14, 1984. This decision concerns the computation of his backpay award for the period November 4, 1982, through May 14, 1984.<sup>1/</sup>

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<sup>1/</sup> In his appeal dated September 16, 1985, Dr. Kassel also requested waiver of an overpayment of \$652.93 in FICA which occurred after his reinstatement and was unrelated to his backpay award. By letter dated December 8, 1985, Dr. Kassel advised that that issue has been resolved. Accordingly, it is not considered or discussed herein.

Since the backpay award in this case is the result of an arbitration proceeding, both the agency and union representative were provided with notice and the opportunity to comment on the submission to GAO. No comments were received from the agency's representative in the arbitration proceeding or from the union representative, but additional comments and information were received from Dr. Kassel and the VA Director of Budget and Finance.

Dr. Kassel's submission also referred to an unfair labor practice charge filed with the Federal Labor Relations Authority (FLRA) alleging that the agency had failed to comply with the arbitration award. Since this allegation could conceivably include issues pertaining to backpay, we obtained the public case documents from the FLRA. It appears that two unfair labor practice charges were filed. One charge, 1-CA-40263, was withdrawn at the union's request and with the approval of the FLRA on July 23, 1984. The other charge, 1-CA-40302, was settled by the FLRA on August 6, 1984, prior to issuance of complaint. Our review of the charges and settlement indicates that neither charge raised any of the backpay issues considered herein, and we are aware of no objections to our assertion of jurisdiction over the backpay issues raised by Dr. Kassel's submission.

#### The Agency's Backpay Computations

The Veterans Administration has provided several different breakdowns of backpay computations to Dr. Kassel and to this Office. There are revisions and corrections in each of these. Because of these ongoing revisions, the backpay check issued to Dr. Kassel exceeded the amount actually due. Only the final corrected figures will be discussed herein, with notations where necessary to explain discrepancies.

Dr. Kassel's gross backpay was \$65,871.20 plus \$493.02 in night differentials, for a total of \$66,364.22. From this amount, \$113.60 in interim earnings was deducted.

The agency's initial computation of backpay due Dr. Kassel did not include a deduction for refunded retirement contributions. Subsequently, however, the agency became aware of the new requirement established by the Office of Personnel Management (OPM) in the Federal Personnel Manual (FPM) that refunds of retirement fund contributions withdrawn at the time of discharge must be offset from backpay awards and returned to the retirement fund. See FPM Letter 550-76,

July 15, 1982; FPM Supplement 990-2, Book 550, Subchapter 8 at 550-64.02 (Inst. 73, April 20, 1984). Accordingly, the agency offset \$21,439.65 in refunded retirement contributions and has paid that amount to the OPM.<sup>2/</sup>

Dr. Kassel had received a lump-sum payment in the amount of \$5,944.25 for 295 hours of annual leave at the time of his discharge. This amount was also deducted from his backpay and the leave was restored. Also deducted were retirement contributions for the period of the backpay award in the amount of \$4,610.98. Federal taxes were initially calculated at \$13,272.82 but this figure was later revised and is now \$12,964.96. As corrected, \$491.40 was deducted for medicare payments.<sup>3/</sup>

The agency also deducted \$6,660 which had been received by Dr. Kassel from the State of New Hampshire in the form of unemployment benefits during the period of his removal.

Thus, using the agency's final corrected figures, the agency's action on Dr. Kassel's claim for backpay can be summarized as follows:

Base pay	\$65,871.20
Night differential	<u>+ 493.02</u>
Gross backpay	66,364.22
Less:	
Interim Earnings	\$ 113.60
Refunded retirement contributions for period prior to discharge	21,439.65

<sup>2/</sup> The agency states that OPM initially informed it that interest on the \$21,439.65 at a rate of 3% compounded annually was also due the retirement fund. The agency therefore deducted an additional \$926.33 from Dr. Kassel's backpay. However, the agency states that OPM later changed its position on this issue and said no interest was due. Accordingly, Dr. Kassel has been paid the \$926.33.

<sup>3/</sup> The VA had deducted a total of \$997.47 for 1984 for medicare. Since this exceeded the maximum allowable deduction of \$491.40, the VA says the excess of \$506.07 has been refunded to Dr. Kassel.

Lump-sum annual leave payment	5,944.25	
Retirement contribu- tions for period of award	4,610.98	
Federal taxes	12,964.96	
Medicare	491.40	
New Hampshire unemployment benefits	<u>6,660.00</u>	
Total Deductions		<u>\$ 52,224.84</u>
Net Backpay		<u>\$ 14,139.38</u>

Thus, according to our calculations using the agency's corrected figures, Dr. Kassel should have received net backpay of \$14,139.38. However, because of the agency's ongoing revisions to backpay computations, particularly the uncertainty as to the deduction of unemployment compensation and the delay in learning of the FPM requirement that refunded retirement contributions for the period prior to discharge must be offset from backpay awards, the agency overpaid Dr. Kassel. Specifically, in June 1984, the agency paid \$19,501.72 in backpay to Dr. Kassel. Thus, according to the above calculations, Dr. Kassel received an overpayment of \$5,362.34. The record shows that the agency issued a bill for collection of \$6,660 as the overpayment. As is apparent, however, using our calculations based on the agency's corrected figures, the correct net overpayment is \$5,362.34.

#### ANALYSIS AND OPINION

There are three items in dispute: the deduction from backpay of \$6,660 in New Hampshire unemployment benefits, the deduction of the \$5,944.25 lump-sum annual leave payment, and the deduction of \$21,439.65 in refunded retirement contributions. Dr. Kassel argues that none of these items should have been offset from his backpay award. In the

alternative, he argues that assuming such deductions are required, they should be waived in his case. We will consider each item separately.

#### Deduction of Unemployment Compensation

Dr. Kassel argues that unemployment compensation should not have been offset from backpay because the Federal Personnel Manual Supplement 990-2, Book 550-64.02 (June 16, 1977) says that it should not be deducted.<sup>4/</sup>

We considered the issue of whether or not unemployment benefits should be offset from backpay awards in Glen Gurwit, 63 Comp. Gen. 99 (1983). We held that state unemployment benefits should not be deducted from backpay awards because the reinstated employee may be required to refund that amount to the state. In this case, however, the agency points out that under New Hampshire law the employer, not the employee, is liable to make full restitution to the state unemployment fund for any unemployment benefits paid to an employee for a period covered by or included in any arbitration or backpay award.

Further, the record here contains a copy of a determination by the State of New Hampshire Department of Employment Security, dated July 27, 1984, and addressed to Dr. Kassel, advising him that, since he had received backpay for the period November 4, 1982, to May 14, 1984, the state had determined that he had been overpaid unemployment compensation in the amount of \$6,660. The notice advises that recovery of the overpayment will be accomplished administratively as his "employer is a so called reimbursable employer." A copy of the notice was sent to the VA and it proceeded to deduct that amount from the backpay.

As noted in Gurwit, determinations of whether there have been overpayments of unemployment compensation are in all respects committed to state agencies for action in accordance with that state's unemployment compensation law. In this case, the appropriate state agency determined that an overpayment had occurred, and under New Hampshire law, the employer, rather than the employee is required to refund the money to the state fund. Therefore, giving deference to the

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<sup>4/</sup> FPM Supplement 990-2, Book 550, has since been revised. The new Subchapter 8 on Backpay, dated April 20, 1984, does not specifically discuss unemployment compensation.

state law the VA properly deducted the overpayment of unemployment compensation benefits from Dr. Kassel's backpay.

Accordingly, our decision in Gurwit is hereby modified in part. We now hold that unemployment benefits must be deducted from backpay awards where the appropriate state agency has determined that an overpayment has occurred and has notified the employing Federal agency and where state law requires the employer, rather than the employee, to refund overpayments. Absent such a determination and requirement under state law, the rule in Gurwit applies and unemployment compensation should not be deducted from backpay awards.

#### Lump-Sum Annual Leave Payment

Dr. Kassel also objects to the deduction of \$5,944.25 he received as a lump-sum leave payment. He states that he was told by Personnel that he would not have to repay that money.

We have held that lump-sum leave payments must be offset from backpay awards. Vincent T. Oliver, 59 Comp. Gen. 395 (1980). For the reasons stated in Oliver, the agency's action in deducting this amount from the backpay award is sustained. Where such deductions leave the reinstated employee in debt to the government, the indebtedness may be considered for waiver. Oliver, supra, and Angel F. Rivera, 64 Comp. Gen. 86 (1984). However, in this case, the deduction of Dr. Kassel's lump-sum leave payment from backpay did not result in net indebtedness to the government. Therefore, waiver is denied.

#### Refunded Retirement Contributions

Dr. Kassel argues that he was told several times that he would not have to repay the \$21,439.65 in refunded retirement contributions that he withdrew when he was discharged. He points out the agency officials also initially believed that this money would not have to be offset from backpay, and first became aware of the FPM requirements in June 1984.

The VA's action in deducting refunded retirement contributions and transmitting them to OPM were consistent with the FPM requirements; and we sustained the legality of these requirements in our decision in Rivera, supra. Therefore, we will not disturb the VA's action. We note that the issue of the deductibility of refunded retirement contributions from backpay awards is the subject of a class action filed on

July 18, 1986, in the United States Claims Court, entitled Jerris Wise v. United States, Cl. Ct. No. 447-86C.

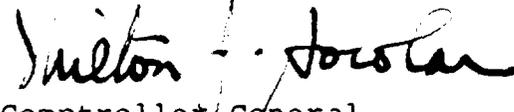
#### Waiver of Overpayment

With respect to Dr. Kassel's request for waiver, we note that waiver may be granted only to the extent there has been an overpayment. As stated above, the VA paid Dr. Kassel \$19,501.72 in backpay. Using the agency's later revised figures, however, we calculate that Dr. Kassel was overpaid \$5,362.34. Accordingly, based upon the present record, this overpayment is subject to waiver consideration.

We grant waiver of the net overpayment received by Dr. Kassel. The backpay computations in this case were complex and were revised and corrected by the VA on several different occasions over an extended period of time. Further, with respect to the offset of unemployment compensation from backpay, Dr. Kassel relied upon published authority which provided that it should not be offset. Since the issue is one of first impression, it would be unreasonable to assume that he knew or should have known how the impact of state law would alter the VA's determination on this issue. We also note that the VA waiver committee found that there is no evidence of fraud, misrepresentation, or lack of good faith on the part of Dr. Kassel with respect to these proceedings. Given these circumstances, we find that it would be against equity and good conscience to collect the net overpayment from Dr. Kassel. Accordingly, we grant waiver of the net overpayment.

#### CONCLUSION

In summary, we have decided that: (1) where the appropriate state agency has determined that an overpayment of unemployment compensation has occurred and state law requires that the employer, rather than the employee, reimburse the state, unemployment compensation should be deducted from backpay; (2) the Veterans Administration acted properly in deducting the lump-sum leave payment and refunded retirement contributions from backpay; and (3) the net overpayment received by Dr. Kassel is waived.

*for*   
Comptroller General  
of the United States