

B-113279-O.M., Jan. 30, 1953

DEC 30 1952

The Comptroller General:

Herewith is the file relative to the claim of _____, Brooklyn, New York, for back pay under the act of June 10, 1948, Public Law 623, 62 Stat. 354, accruing upon reinstatement to position of customs inspector GS-7 for the period March 3, 1950, to September 6, 1951, less earnings received from outside employment. Also included in the file are requests for periodic pay increases due on November 1, 1950 and November 10, 1951; 10% cost of living allowance, apparently made under the provisions of Public Law 201, approved October 24, 1951, 65 Stat. 612; and \$1800 on account of overtime compensation which he might have earned had he been retained on the rolls during the suspension period.

The claimant further requests that \$1000 on account of wear and tear on automobile used in outside work and \$400 for entertainment expenses and nonreimbursable expenses, in connection with his duties as sales manager for the _____ Corporation be considered deductible for the purposes of the instant claim and, that as he worked 6 days a week in outside employment, he feels he should be charged with only 5/6 of those outside earnings.

Claimant was removed from his position c.o.b. March 3, 1950, as a result of charges preferred against him. The United States Civil Service Commission, after sustaining that action, held a hearing on April 25, 1951; reversed the decision of its Board of Appeals and Review and the Second Civil Service Region, New York, New York and in a letter dated July 12, 1951, to the Director of Personnel, Treasury Department, Washington, D. C., requested that claimant be restored retroactively to the date of his removal to the position of customs inspector, GS-7, or a position of like seniority, status and pay. His restoration to duty as a customs inspector became effective on September 6, 1951.

On the basis of a per annum rate of \$4,075, covering the period claimed, computation of the amount due would be as follows:

<u>Period</u>	<u>Basic</u>	<u>Retirement</u>	<u>Net</u>
March 4, to June 30, 1950	\$1,332.21	\$79.90	\$1,252.31
July 1, 1950 to June 30, 1951	4,074.98	244.40	3,830.58
July 1, to September 5, 1951	752.32	45.12	707.20
	<u>\$6,159.51</u>	<u>\$369.42</u>	<u>\$5,790.09</u>

Section 6(b) of the act of June 10, 1948, 62 Stat. 354; 355, provides that after reinstatement or restoration to duty on the ground that such removal or suspension was unjustified or unwarranted, compensation shall be paid at the rate received on the date of such removal or suspension, for the period for which no compensation was received with respect to the position from which removed or suspended, less any amounts earned through other employment during such period.

The rate of \$4,075 per annum was used in computing the compensation due for the period involved as this was the rate claimant was receiving on the date of suspension. In 28 Comp. Gen. 333 it was held in effect that the within grade salary benefit may not be included since the act of June 10, 1948 requires the payment of compensation at the rate in effect at date of suspension. However, in view of B-82633, April 11, 1949, it would appear that such increases may be for inclusion if all of the conditions are met as to such increases. See also B-110892 September 10, 1952 and B-111313-O.M., August 29, 1952. The answer to this question will no doubt be relied upon by the administrative office in considering the periodic increase claimed as of November 10, 1951.

Retirement deductions which are required by section 10 of Civil Service Retirement Act of 1930, as amended, to be in a sum equal to 6 percent of an employee's basic salary, pay, or compensation, are to be computed on the basis of the gross compensation due under section 6(b) supra, for a period of erroneous suspension or removal, prior to deducting any amounts which may have been earned by the employee through other employment during such period. See 28 Comp. Gen. 563.

Claimant also requests that consideration be given to the ten percent cost of living increase allowed as of July 1, 1951 to which he feels he is entitled and to an amount he would have earned as overtime compensation in the sum of \$1800. Apparently he refers to the provisions of Public Law 201, approved October 24, 1951, 65 Stat. 612 in the first instance and bases the overtime claim on the assumption that he would have earned this amount had he been on the rolls. It is not believed the provisions of the act of October 24, 1951 take precedent over provisions of the act of June 10, 1948 and that he would not be entitled to payment for anticipated overtime since no duties were performed for the Government during the period of suspension and furthermore it is within the discretion of the various departments and agencies to designate employees to perform overtime services.

There does not appear to be any sound basis to the request of the claimant that the sum of \$1,000 for operating expenses, for use of car, as a sales manager for the Corporation, and the sum of \$400 for entertainment costs, porter charges, trade publication costs, telephone expenses, etc. incurred in connection with these duties be deducted from outside earnings in arriving at the amount to be paid. In this connection no allowance is made or approved for 1/6th of outside earnings because of the fact such sums were earned on the basis of a six day work-week. B-95927, January 12, 1951.

The entire lump sum leave payment (308 hours) for accumulated and accrued annual leave which was paid following date of removal on March 3, 1950, is for refund, including tax (28 Comp. Gen. 334).

The Treasury Department has approved the claim in the net amount of \$1,429.43, whereas the amount appearing to be due is \$1,933.43, or a difference of \$504. This sum, \$504, represents earnings received for night work as a teacher for the City of New York which position was held before he was suspended from duty. Under this circumstance he would be allowed to keep this amount without deduction on account of outside earnings. (B-109260, January 17, 1952 and B-88927, January 28, 1952; B-98701, January 22, 1952, also Jackson vs. United States, 121 Ct. Cls. 405.

The amount appearing to be due, if the claimant is not entitled to the periodic pay increases at the per annum rate of \$4,075, would be as follows:

Net amount due the employee as computed above		\$1,933.43
Withholding tax - 20% of \$1,933.43	-	\$ 386.69
Retirement at 6%	-	369.42
Payable to claimant	-	1,177.32
		\$1,933.43

Since the administrative office has recommended the 1952 appropriation for payment of the entire amount found due and it appears that three fiscal years are involved within the suspension period, it would seem that these accounts should be charged with the amount due. This rule was followed in B-103238 of May 10, 1951 and July 2, 1951. However, in view of the complication that would arise in determining the appropriate amounts chargeable to each fiscal year's appropriation account, it would seem that the 1952 fiscal year appropriation may be charged as administratively recommended.

In view of the various questions raised by the claimant and the fact that it is proposed to pay \$504 more than administratively

approved, the matter is submitted for your consideration and instructions.

W. S. BENJAMIN

Assistant Chief, Claims Division

Enclosures

VW

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Chief, Claims Division

Returned. Compensation as proposed in your submission for the period of separation properly is for computation in accordance with the rules stated in 28 Comp. Gen. 333. Upon restoration the employee's rate of compensation may be fixed to include within-grade salary advancements in consonance with the ruling in 28 Comp. Gen. 563. However, as the record is not clear as to the administrative action taken in that connection--see notation in file of periodic step increase effective January 6, 1952--the claim for a similar increase effective November 10, 1951, may be disregarded at this time.

Since the action taken in effecting restoration to duty under the act of June 10, 1948, 62 Stat. 354, reasonably may be regarded as creating the appropriation obligation, the appropriation current at the time of such restoration may be charged in the settlement as administratively proposed.

In other respects the disposition of the claim as proposed in your submission appears to be correct.

Senator Lehman and Representative Multer should be advised of the final action in accordance with Office letters of January 14, 1953.

(Signed) Frank L. Yates

Acting Comptroller General
of the United States

Enclosures