

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

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D-178712

JUL 1 1973

The Honorable Earl L. Rutz
The Secretary of Agriculture

Dear Mr. Secretary:

This is in reply to letter of May 21, 1973, from James H. Lake, the Deputy Assistant Secretary, requesting our decision concerning the recomputation and entitlement to premium pay of a group of meat inspectors of the Animal and Plant Health Inspection Service who were awarded backpay. The inspectors involved, stationed at Boston, Massachusetts, were suspended from their positions in late 1971 as a result of their indictments for alleged violations of titles 19 and 21 of the United States Code. After several of the suspensions were reversed following appeal to the Civil Service Commission, the remainder were canceled.

The employees have received backpay at the straight time rate and all earned leave and accrued leave (subject to the maximum limitation prescribed by law) has been recredited for the period covered by the corrective action. It is now proposed to compute premium pay based on the average overtime worked by all inspectors in Boston during the period January 9 through November 11, 1972. Our answers to the specific questions presented by the Deputy Assistant Secretary are as follows:

1. Is the proposed method of computing the employee's premium backpay during the period of the improper suspension acceptable?

The suspensions began in late 1971 and continued until 1972. The period in late 1971 is excluded from the computation of average overtime work performed since large scale suspensions created unsettled and abnormal work conditions and the period from January 9 through November 11, 1972, appears to be sufficiently lengthy to avoid distortion. All employees will be paid for the average hours of overtime based on such computation which method of payment is consistent with the agency agreement with the employee's union to equalize overtime. Separate computations have been made for nonsupervisory inspectors and for supervisors since supervisors typically perform less overtime than inspectors.

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It is our view the method followed is reasonable and may be applied as proposed. In addition to 41 Comp. Gen. 273 (1961), cited in the letter, see B-163142, February 28, 1960, copy enclosed.

2. Is the Agency's interpretation of FPM Chapter 550, Subchapter 5-d, correct in that the inspectors are not entitled to backpay for the period of imprisonment?

Subsection 550.804(d) of title 5, Code of Federal Regulations, embodies the same provision as that of the Federal Personnel Manual to which your letter refers. That provision is as follows:

(d) In computing the amount of backpay under this section and section 5526 of title 5, United States Code, the agency may not (1) include any period during which the employee was not ready and able to perform his job because of incapacitating illness, except that the agency shall grant upon the request of the employee any sick or annual leave to his credit to cover the period of incapacity by reason of illness, or (2) include any period during which the employee was unavailable for the performance of his job and his unavailability was not related to, or caused by, the unjustified or unwarranted personnel action.

The reason the employees were unavailable for the performance of their jobs within the meaning of clause (2) of the regulation quoted above was their imprisonment following indictment. Although the erroneous suspensions were a result of the indictments which led to imprisonment and thus might be viewed as "related to" the periods of incarceration, we believe it would be incongruous with the intent of this law to interpret the regulation other than as you propose. See Appel v. United States, 135 C. Cls. 339 (1956). Accordingly, our answer to this question is affirmative.

3. Is it proper and acceptable for the Agency to pay premium backpay for the period of time during which the employees were on annual leave at their own request in lieu of suspension?

B-178712

As explained in your letter the inspectors involved were allowed to use annual leave in lieu of time in suspension status prior to the determination that the suspension actions were erroneous. Upon the latter determination the annual leave was recredited and, in effect, the date of suspension was accelerated. We see no reason to follow a different policy with respect to the period of suspension resulting from recredit of annual leave from that applicable to the later period for which entitlement to premium pay has been established. Accordingly, we believe premium pay should be computed and paid for the period in question.

Sincerely yours,

PAUL G. DELOACH

For the Comptroller General
of the United States