

00886

William Haubert  
Civ. Pers./

**DECISION**



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

**FILE:** B-186963

**DATE:** March 4, 1977

**MATTER OF:** Milo D. Burroughs - Back pay for  
concurrent military and civilian  
service

**DIGEST:** Civilian employee, who was wrong-  
fully removed from his civilian position,  
entered on active military service.  
Claim for back pay under U. S. C.  
§ 5596 may not be paid for period after  
entrance on active military duty since  
service rendered claimant unavailable  
for performance of civilian position.

This action concerns an appeal by Mr. Milo D. Burroughs of the denial by our Claims Division of his claim for additional back pay in connection with his wrongful removal from employment with the Department of the Army.

The record indicates that effective September 22, 1967, Mr. Burroughs was removed from his position as a civilian employee of the Department of the Army as a result of a disciplinary action instituted by that Department. The removal was subsequently appealed to the Civil Service Commission and the Federal courts. Ultimately the Civil Service Commission Board of Appeals and Review decided, on May 22, 1974, that the charges which resulted in the disciplinary action were insufficient to support the removal. The Board therefore recommended that the employing agency cancel the removal action and restore Mr. Burroughs to his former position and grade retroactively to September 22, 1967. Cancellation of the removal action was effected by the agency on June 10, 1974.

Mr. Burroughs was entitled to back pay pursuant to 5 U. S. C. § 5596 (1970) and a check in the amount of \$3,869.01 was issued in his favor on October 7, 1974. Since Mr. Burroughs had entered on active military duty in the United States Army on February 12, 1968, back pay was computed only for the period from September 22, 1967 to February 12, 1968. This computation was made in accordance with the position of the Department of the Army that under the provisions of 5 U. S. C. § 5533 (1970), an individual is not entitled to receive compensation from more than one position paid from funds appropriated by the Congress. The check was returned by the claimant to the Department as unacceptable in light of his position that under the Back Pay Act, 5 U. S. C. § 5596 (1970), he is entitled to back pay retroactive to the date of his wrongful removal, less the amount earned as an officer of the United States Army.

B-186963

The question as to the amount of back pay owed to Mr. Burroughs was then referred to our Claims Division. On May 13, 1976, Settlement Certificate No. Z-2532545 was issued disallowing Mr. Burroughs' claim for additional back pay after the date on which he entered on active military duty. The bases for this determination were (1) that Mr. Burroughs failed to meet the requirements of regulations implementing the Back Pay Act in that his military obligations rendered him unavailable for the performance of the duties of his former civilian position and (2) since active military service is incompatible with concurrent Federal civilian service, compensation for the civilian position may not be paid. By a letter dated May 18, 1976, the settlement was appealed to this Office on the grounds that Mr. Burroughs had entered on active duty in the Army to fulfill his legal commitment to minimize or mitigate his loss as the result of the wrongful removal from his civilian position.

The Back Pay Act, 5 U. S. C. § 5596(b) provides that a civilian employee who is found to have undergone an unjustified or unwarranted personnel action which results in a loss of pay, shall receive all pay normally due him during the period of the action, less any amounts earned by him through other employment. Pursuant to 5 U. S. C. § 5596(c), the Civil Service Commission has prescribed regulations to implement the statute. The Commission's regulations, at 5 C. F. R. § 550.804, provide in relevant part as follows:

"(d) In computing the amount of back pay under this section and section 5596 of title 5, United States Code, the agency may not \* \* \* (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."

In considering Mr. Burroughs' unavailability for civilian duty by reason of his active military status, the operative concept is his being subject to military control. The paramount obligation of a service member to render military service makes it impossible to accept without qualification another obligation to

B-186963

render concurrent service in a civilian capacity. The time of one in the military is not his own, however limited the duties of a particular military assignment may be. 18 Comp. Gen. 213 218-17 (1938). Since any agreement for the rendition of services to the Government in a civilian capacity is incompatible with the member's military duties, Mr. Burroughs' entrance on active military duty on February 12, 1968, rendered him unavailable for the performance of his former civilian position after that date.

Further, the claimant's decision to enter military service was his personal and voluntary choice. After the removal from his civilian position, Mr. Burroughs was free to seek employment from which he could readily return to his former Government position in the event of a favorable appeal from the agency action. Certainly, the removal action did not require the claimant to commit himself to active duty in the Army, nor is it so contended. It is equally certain that although the separation did cause Mr. Burroughs to seek alternate employment, his decision to enter Army service effectively removed for a long period his ability to resume his civilian employee duties in the event he succeeded in obtaining a reversal of the removal action. Accordingly, under the provisions of 5 U. S. C. § 5596 and implementing regulations, Mr. Burroughs is not entitled to back pay for the wrongful separation from his civilian position after the date on which he entered the active military service.

Accordingly, Mr. Burroughs may not properly be paid back pay for the period from February 12, 1968, when he entered on active military duty, to the date of his release from such duty. Therefore the denial by our Claims Division of Mr. Burroughs' claim for additional back pay is hereby sustained.

The decisions of this Office are binding upon the Executive branch of the Federal Government. Regarding the question of further appeal, see 28 U. S. C. §§ 1346 and 1491 (1970) for matters cognizable by the United States District Courts and the United States Court of Claims.

Acting

  
Comptroller General  
of the United States

UNITED STATES GOVERNMENT

*Memorandum*

William Haubert  
Civ. Pers.  
GENERAL ACCOUNTING OFFICE

TO : Director, Claims Division

March 4, 1977

FROM : Acting  
Comptroller General

*W. Haubert*

SUBJECT: Milo D. Burroughs - Back Pay for Concurrent Civilian and  
Military Service - B-186963-O.M.

Returned herewith is file no. Z-2532545 forwarded for our consideration on June 9, 1976, in connection with the appeal by Mr. Milo D. Burroughs for reconsideration of the denial of his claim for back pay during the period in which he was performing active military duty.

That denial is sustained by our decision of today, B-186963, copy attached.

Attachment