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

B-196354 December 14, 1979

The Honorable Spark Matsunaga
United States Senate

Dear Senator Matsunaga:

This is in further response to your letter of November 21, 1979, regarding the Comptroller General's rulings allowing an exception to the "no work, no pay" rule in cases involving claims for overtime pay.

The document enclosed by your constituent, Robert K. Sellers, appears to be an analysis prepared by agency management of the potential impact of an arbitration award on future grievances relating to the assignment of overtime in the bargaining unit in question. Without more information, we are not in a position to comment on the analysis, or the impact of the award on future grievances filed under that particular collective bargaining agreement. However, the following information is provided with respect to the Comptroller General's rulings referred to in the memorandum, and related amendments to the Back Pay Act.

The authority under which an agency may pay backpay is the Back Pay Act of 1966, 5 U.S.C. § 5596, as amended by Section 702 of the Civil Service Reform Act, Public Law No. 95-454, October 13, 1978, 92 Stat. 1111, 1216. That Act authorizes the payment of backpay where an appropriate authority determines that an employee has been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of pay, allowances, or differentials.

Prior to 1974, the Back Pay Act was interpreted to authorize backpay only when the unjustified or unwarranted personnel action resulted in the actual loss or reduction of payments previously due an employee. In other words, backpay was authorized only where the unjustified or unwarranted personnel action was an act of commission, e.g., suspensions, demotion, reduction in pay, etc. The employee had to have lost something he previously had. Acts of omission, such as the failure to properly assign overtime, or

to properly promote an employee, were not viewed as a basis for entitlement to backpay because the employee had not suffered the actual loss of monies previously due.

In 54 Comp. Gen. 312 (1974) and subsequent decisions, we overruled this narrow interpretation of the Back Pay Act. Our decisions have since held that an unwarranted or unjustified personnel action may provide a basis for backpay whether the action was one of omission or commission. Thus, where an appropriate authority determines that a violation of a nondiscretionary agency policy, or a mandatory provision of a collective bargaining agreement, constitutes an unjustified or unwarranted personnel action which resulted in the loss of pay, allowances, or differentials, the employee may be awarded backpay. In 1978, Congress amended the Back Pay Act and incorporated this broader interpretation into the statute. The Act now specifically provides that the term "'personnel action' includes the omission or failure to take an action or confer a benefit." See Section 702 of the Civil Service Reform Act, supra, amending 5 U.S.C. § 5596(b).

The "no work, no pay" rule in overtime cases referred to by your constituent originated prior to our 1974 decisions. It was based upon the now outdated distinction between acts of omission and acts of commission. The failure to properly assign overtime had been viewed as an act of omission and therefore not a basis for backpay. Under the broader interpretation given the Back Pay Act since our 1974 decisions, and now under the explicit provisions of the Act as amended in 1978, this distinction is no longer determinative. The failure to afford an opportunity for overtime work in accordance with the requirements of agency regulations or a collective bargaining agreement--an act of omission--is as much an unjustified or unwarranted personnel action as are acts of commission. 54 Comp. Gen. 1071 (1975); 55 id. 171 (1975). In this context, the "no work, no pay" rule no longer constitutes an absolute bar to the payment of backpay in cases involving claims for overtime pay.

We trust the above information regarding backpay in overtime cases has been helpful. The other item referred to in the memorandum, the award of $750 in attorney fees, would not have been authorized by our decisions prior to the passage of the 1978 amendments to the Back Pay Act. We had previously held that since the Act did not

authorize payments of attorneys fees, and in the absence of any other statutory authority for such a payment, no attorney fees could be paid. B-184200, April 13, 1976; B-167461, August 9, 1978. However, the 1978 amendments to the Back Pay Act specifically authorize payment of reasonable attorney fees when the employee prevails and payment by the agency is warranted in the interest of justice. As indicated in the memorandum enclosed by your constituent, the arbitrator in this case apparently concluded that an award of $750 in attorney fees was reasonable and warranted in the interest of justice. The memorandum does not indicate whether or not management took exception to the award by filing an appeal with the Federal Labor Relations Authority, which has final administrative authority for the review of arbitration awards involving Federal employees.

Copies of the cited decisions are enclosed for your convenience.

Sincerely yours,

Milton J. Socolar

For The Comptroller General
of the United States

Enclosures