

**DECISION**

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

**FILE:** B-208220

**DATE:** April 22, 1983

**MATTER OF:** Ladorn Creighton - Back Pay

**DIGEST:**

1. A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with backpay under ~~42 U.S.C. § 2000e-16(b)~~ (1976 & Supp. III 1979). Under regulations implementing section 2000e-16(b), set forth in 29 C.F.R. § 1613.271(b)(1) (1982), backpay must be computed in the same manner as if awarded pursuant to the Back Pay Act, as amended, 5 U.S.C. § 5596 (1976 & Supp. IV 1980), and its implementing regulations set forth in 5 C.F.R. § 550.805 (1982). The standards for computing backpay must be applied in light of the make-whole purposes of 42 U.S.C. § 2000e-16(b).
  
2. A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with backpay under 42 U.S.C. § 2000e-16(b) (1976 & Supp. III 1979). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against backpay since such an offset would contravene the make-whole purposes of 42 U.S.C. § 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded.

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Edward J. Obloy, General Counsel of the Defense Mapping Agency (DMA), requests a decision as to whether a cash award granted to Mr. Ladorn Creighton under the Employee Incentive Awards Act, 5 U.S.C. §§ 4501-4507 (1976 & Supp. IV 1980), during the period he was discriminatorily denied a promotion, must be offset against the backpay which he was awarded under 42 U.S.C. § 2000e-16(b) (1976 & Supp. III 1979). We hold that a cash award granted to an employee during the period of a discriminatory personnel action should not be offset against backpay since such an offset would contravene the make-whole purposes of 42 U.S.C. § 2000e-16(b). Moreover, once an incentive award is granted in accordance with 5 U.S.C. §§ 4501-4507, and implementing regulations in ~~5 C.F.R. Part 451~~ (1982), the recipient acquires a vested right to the amount awarded.

On April 20, 1982, DMA determined that Mr. Creighton, a grade GS-12 Supervisory Cartographer, had been denied a promotion to the position of Supervisory Cartographer, grade GS-13, in violation of the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. § 2000e-16, and consequently awarded him a retroactive promotion effective August 10, 1979. In computing the employee's backpay under 5 U.S.C. § 5596, a question arose as to whether a \$500 incentive award granted to Mr. Creighton on October 23, 1980, in recognition of his sustained superior performance of assigned duties during the period October 10, 1979, to October 10, 1980, should be deducted from backpay in view of the provision of the Back Pay Act which requires deduction of "any amounts earned by the employee through other employment" during the period of the discriminatory action. Pending resolution of this issue by our Office, DMA is withholding \$500 from the backpay awarded Mr. Creighton.

Section 2000e-16(b) of Title 42, United States Code, provides make-whole remedies, including backpay, for an employee of the Federal Government who is found to have undergone a discriminatory personnel action based on race, color, religion, sex, or national origin. Under regulations implementing section 2000e-16(b), set forth in 29 C.F.R. § 1613.271(b)(1), backpay is to be computed in the same manner as if awarded pursuant to the Back Pay Act and its implementing regulations. See generally, B-180021, March 20, 1975. Section 550.805(e) of Title 5, Code of Federal Regulations, implementing the Back Pay Act, provides that, in computing the amount of backpay under 5 U.S.C. § 5596, an

agency shall deduct "[a]ny amounts earned by an employee from other employment during the period covered by the corrective action."

The standards for computing backpay awarded under 42 U.S.C. § 2000e-16(b), as defined by 5 C.F.R. § 550.805(e), must be applied in light of the remedial purposes of section 2000e-16(b). Specifically, we note that the Equal Employment Opportunity Act was intended to eradicate discrimination in the Federal Government and to make the victim of discrimination whole by restoring him to the position he would have occupied had the discrimination not occurred. See Association Against Discrimination v. City of Bridgeport, 647 F.2d 256, 278 (1981), and cases cited therein; and Hackley v. Roudebush, 520 F.2d 108, 136 (1975).

In keeping with the foregoing principles, we hold that the amount of the award received by Mr. Creighton for superior performance in grade GS-12 need not be deducted from backpay. Deduction of the award would allow the discriminating agency both to benefit from the employee's superior performance in the grade from which he had been denied promotion and to subtract from backpay the award recognizing such performance. Clearly, such a result would contravene the remedial policies underlying the Equal Employment Opportunity Act.

Moreover, we note that, while the granting of an incentive award is discretionary with the employing agency, the recipient of an award duly granted under 5 U.S.C. §§ 4501-4507, as implemented by the provisions of 5 C.F.R. Part 451, acquires a vested right to the amount awarded. See John J. Kelly, B-204724, September 13, 1982; and Lawrence J. Ponce, B-192684, November 19, 1979. Since there is no evidence that the \$500 cash award was granted to Mr. Creighton in violation of the awards statute or its implementing regulations, the employee is entitled to retain the award.

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In view of the foregoing, we hold that the \$500 award received by Mr. Creighton during the period of the discriminatory personnel action may be retained by him without offset against the backpay to which he has been determined to be entitled under 42 U.S.C. § 2000e-16(b).

*for Harry D. Jan Clave*  
Comptroller General  
of the United States