

**DECISION**

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

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27497**FILE:** B-213316**DATE:** February 23, 1984**MATTER OF:** Gregorio Natividad - Backpay and  
Attorneys' Fees**DIGEST:**

1. An employee was discharged from his position on June 15, 1979. Such action was found to be unjustified by the Merit Systems Protection Board (MSPB), which ordered that his separation be canceled. Employee claims entitlement to pre-June 15, 1979, backpay and benefits under the MSPB ruling. The only issue before the MSPB was the propriety of the agency removal on June 15, 1979. Since there were no allegations made to the MSPB that the agency had taken other unjustified actions prior to that date, the ruling does not support a backpay claim for an earlier period.
2. An employee was discharged from his position on June 15, 1979. Such action was found to be unjustified by the Merit Systems Protection Board (MSPB), which ordered that his separation be canceled. Employee claims entitlement to night differential under the MSPB ruling. On restoration, an employee is entitled to the employment status enjoyed at removal and pay and benefits lost as the result of the unjustified removal. Since the employee had been in a day-shift only status on date of removal for reasons totally unrelated to the removal action and was placed in that status upon restoration to duty, he is not entitled to night differential as an item of backpay under the MSPB decision. See cases cited.
3. An employee was discharged from his position on June 15, 1979. Such action was found to be unjustified by

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the Merit Systems Protection Board (MSPB), which ordered that his separation be canceled. The employee claims that he did not receive Saturday and Sunday premium pay in award. Although not itemized when backpay was paid, employee received premium pay for 1,128 hours based on average hours worked by other employees during the same time at the same employment location. In absence of showing of agency error, we will not question correctness of its computation.

4. An employee was discharged from his position on June 15, 1979. Such action was found to be unjustified by the Merit Systems Protection Board (MSPB), which ordered that his separation be canceled. The employee claims entitlement to attorney fees. The MSPB denied attorney fees under 5 U.S.C. § 7701(g). This Office has no authority to review MSPB decisions, and therefore, the denial under section 7701(g) must stand. If an attorney fees claim is being asserted under 5 U.S.C. § 5596(b)(A)(ii), then that claim is also denied, since claimant has not prevailed on any of the backpay computation issues raised with the agency or this Office.

This decision is in response to a request from an authorized certifying officer of the Food Safety and Inspection Service, Department of Agriculture. The matter involves the entitlement of its employee, Mr. Gregorio Natividad, to receive additional backpay and other related benefits incident to being retroactively restored to his position, effective June 15, 1979.

#### BACKGROUND

Mr. Natividad was a meat inspector with the Food Safety and Inspection Service, having been employed in

that capacity for a number of years. On June 15, 1979, he was removed from his position and dismissed, based on agency charges of failure to perform required duties and falsification of official records in violation of the Federal Meat Inspection Act and the Meat and Poultry Inspection Regulations. He appealed his dismissal to the Merit Systems Protection Board (MSPB). By initial decision issued by the San Francisco Regional Office of the MSPB on August 20, 1979, the agency action was sustained.

Mr. Natividad appealed the Regional Office ruling to the MSPB, Washington, D.C. On April 22, 1981, a final decision reversing the initial decision was rendered and the agency was ordered to cancel the removal action and furnish evidence of compliance within 10 days. By letter dated May 4, 1981, the agency provided documentation to the San Francisco Regional Office of the MSPB that the removal was canceled retroactive to June 15, 1979.

On June 18, 1981, Mr. Natividad again filed a petition with the MSPB, this time alleging that in spite of the fact that he had been appropriately reinstated, he had not been made completely whole. He contended that he was entitled to, but failed to receive night pay differential, Saturday and Sunday premium pay, and overtime pay. He also contended that he had been forced to take sick and annual leave following an injury which he sustained on December 1, 1978, until the date he was removed from his position and sought its restoration.

The agency response detailed the backpay payment made, the basis upon which the payment was predicated, and provided their reasons why Mr. Natividad was not entitled to additional pay. On September 2, 1981, Mr. Natividad, through his attorney, Ronald P. McCluskey, submitted a rebuttal through the MSPB. The issue regarding use of sick and annual leave was apparently abandoned and the only matters requested to be considered by the MSPB were the night pay differential, Saturday and Sunday premium pay, and overtime pay questions.

On May 27, 1982, the San Francisco Regional Office of the MSPB issued their Addendum Compliance decision, ruling that they had no jurisdiction over backpay entitlements under 5 U.S.C. § 5596 and 5 C.F.R. Part 550. Citing to

several of the Board's earlier decisions, the Regional Office concluded that backpay disputes which cannot be agency resolved are to be submitted to the General Accounting Office for settlement.

Based on that ruling, the following backpay claims have been presented here for decision:

- 1) Night Differential Pay - 232 hours during the years 1978, 1979 and 1980
- 2) Saturday and Sunday Premium Pay - August 1978 through May 15, 1981
- 3) Overtime Pay - August 1978 through June 1979

In addition, Mr. Natividad now seeks reimbursement for attorney fees in the amount of \$1,154.60 incurred on and after August 19, 1981.

For the reasons which follow, we conclude that Mr. Natividad is entitled to neither additional backpay nor attorney fees.

#### DISCUSSION

The law governing entitlement to backpay is contained in 5 U.S.C. § 5596 (1982), subsection (b) of which provides in part that:

"(b)(1) An employee of an agency who,  
\* \* \* is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

"(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

"(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period \* \* \* and

"(ii) reasonable attorney fees related to the personnel action \* \* \* shall be awarded in accordance with standards established under \* \* \* [5 U.S.C. § 7701(g)] \* \* \*."

Pre-June 15, 1979 claims

The singular issue before the MSPB was whether the action by the agency removing Mr. Natividad from his position on June 15, 1979, based on charges that he had failed to perform his required duties and had falsified official Government records in violation of law was unjustified or unwarranted. The Board found that the agency charges were not substantiated and concluded that Mr. Natividad was improperly removed from his position and ordered that his separation be canceled. No allegations were contained in Mr. Natividad's petition to the MSPB that the agency had taken action against him prior to his removal on June 15, 1979, which was unjustified or unwarranted.

In view of the fact that the MSPB is "an appropriate authority" for the purposes of 5 U.S.C. § 5596 and made no finding of unjustified or unwarranted agency action during the period prior to June 15, 1979, no basis exists upon which a backpay claim for such period may be predicated on the MSPB ruling in this case. Accordingly, Mr. Natividad's pre-June 15, 1979, backpay claim is denied.

Post-June 15, 1979 claims

Under the law, an employee's right to backpay and related benefits upon restoration to duty is dependent on his employment status at the time the unjustified or unwarranted action which diminished his pay and benefits is found to have occurred. Thus, when an individual is restored to the position occupied, such pay and benefits

which were previously enjoyed and lost, inure to the employee's benefit as though the adverse action never occurred.

Night Differential Pay

According to agency records, Mr. Natividad was removed from the established shift rotation pattern in August 1977, with the concurrence of his union, and placed on the day shift so that he could receive direct supervision for performance evaluation purposes. He remained in a day shift status from then until he was removed from his position. Following his restoration to duty in May 1981 he was again assigned only to the day shift. It appears that the performance question which gave rise to the decision to place him in a day shift direct supervision status, which supervision was apparently unavailable on the night shift, was a matter separate from and totally unrelated to the removal issue before the MSPB.

We have held that under the provisions of 5 U.S.C. § 5596, in order for an individual to be entitled to backpay, not only must there be a determination that the employee has undergone an unjustified or unwarranted personnel action, but that such action resulted in the loss of the pay, allowances or differentials in question. Further, the remedies afforded thereunder, are not available unless it is also established that but for the determined wrongful action, the loss of pay, allowances or differentials would not have occurred. 54 Comp. Gen. 760 (1975), and 55 Comp. Gen. 427 (1975).

In view of the fact that Mr. Natividad was not in a night shift rotation status at the time he was removed, he was not entitled to such differential as an item of backpay upon being retroactively restored to his position effective June 15, 1979.

Saturday and Sunday Premium Pay

On July 22, 1981, payment in the amount of \$40,842.54 was made to Mr. Natividad by the agency in settlement of his backpay claim covering the period June 15, 1979, to May 15, 1981, when he was restored to duty. Included in that payment was increased straight time pay to reflect a within-grade increase from grade GS-9, step 6, to step 7, effective

September 23, 1979, and premium pay for Saturday and Sunday work based on the average number of hours of such work performed by other employees assigned to the location where Mr. Natividad would have been working had he not been removed from his position. While we understand that the premium pay hours were not separately itemized for him when payment was made, the record shows that the agency included in that payment, payment for a total of 1,128 premium pay hours, subject to the following breakdown:

June 15, 1979 - December 31, 1979 - 375.55 hours

January 1, 1980 - December 31, 1980 - 570.50 hours

January 1, 1981 - May 15, 1981 - 181.75 hours

In the absence of a showing by Mr. Natividad that an error had been made, we will not question the correctness of the agency's computation of his premium pay entitlement.

#### Attorney Fees

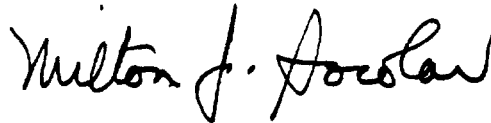
Under the provisions of 5 U.S.C. § 7701(g)(1), the MSPB is authorized to award reasonable attorney fees in connection with an employee's appeal from an adverse action to that body, if the employee prevails and it is determined by them that payment by the agency is deemed to be warranted "in the interest of justice."

The record before us contains a decision from the San Francisco Regional Office of the MSPB, dated July 16, 1982, holding that Mr. Natividad is not entitled to an award of attorney fees for services rendered during the prosecution of the compliance petition. This Office is not authorized to review decisions of the MSPB, and, therefore, there can be no award of attorney fees under 5 U.S.C. § 7710(g)(1). Mary K. Hatler, 61 Comp. Gen. 290 (1982).

To the extent that the attorney fees claimed do not relate to the successful prosecution of an MSPB appeal under the before-mentioned provisions, 5 U.S.C. § 5596(b)(1)(A)(ii), provides authority for payment of such fees to employees found to have been affected by unjustified or unwarranted personnel actions. Regulations governing payments of such fees are contained in 5 C.F.R.

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Part 550, subpart H. Under 5 C.F.R. § 550.806(c)(1) attorney fees awards are to be made only in the interest of justice, and in accordance with the MSPB regulations governing attorney fees awards under 5 U.S.C. § 7701(g). Under 5 C.F.R. § 1201.37(a) of the MSPB's regulations, an attorney fees award may be made only to a prevailing party. Since none of contentions put forth by Mr. Natividad's counsel have been adopted by the agency or by this Office, Mr. Natividad has not prevailed in his attempt to obtain more backpay, and an attorney fees award may not be made. Jack M. Haning, B-211388, January 17, 1984.



Acting Comptroller General  
of the United States