DECISION

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

50876

FILE: DATE: JUL 3 1975 95437

MATTER OF: B-182526

Bennie L. Moore - Backpay Computation - Discrimination

DIGEST:

1. Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Total interim earnings from private enterprise are for offset against total Federal backpay otherwise due, even though this results in no backpay payment. Interim earnings may not be computed and set off on a pay period by pay period basis to reduce the effect of interim earnings.

2. Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. § 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay.

The National Finance Center, United States Department of Agriculture, has requested an advance decision as to the computation of backpay due Mr. Bennie L. Moore incident to a cancellation of the personnel action which terminated his services during probation. It is stated that the termination was the result of racial discrimination, with his career-conditional appointment of June 28, 1970, terminated effective November 20, 1970.

It appears that Mr. Moore's appointment is seasonal, with an alternating tour of duty of 19 pay periods of full-time status and 7 pay periods of called-when-needed (CWN) status. When cancellation of the termination was made on December 10, 1972, Mr. Moore was restored to his CWN status. He started working again intermittently on January 22, 1973, and went to full-time work on April 9, 1973. It is stated that during the interim period he was off the rolls, Mr. Moore's total private employment earnings exceeded his estimated Government earnings, had he not been terminated.

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Specifically the agency asks the following questions:

"Question No. 1: In computing the back pay of Mr. Bennie L. Moore and offsetting private earnings against the back pay, may the Government and private pay be computed and offset on a pay period by pay period basis in view of the seasonal nature of both the Government and private employment?

"Question No. 2: If the back pay and offset may not be computed on a pay period by pay period basis, as in Question No. 1, may the Government pay which would have been earned for the period 3/21/71 to 5/15/71 (the initial period during which the claimant would have worked had he not been terminated and during which he had not yet located other employment) be disregarded in offsetting private earnings, regardless of the excess private earnings later?

"Question No. 3: If questions No. 1 and 2 are answered in the negative, is the $346.40 paid in lump sum for 72 hours of annual leave and 8 hours holiday pay, subject to consideration for waiver under 5 U.S.C. 5584?

"Question No. 4: If questions No. 1 and 2 are answered in the negative, is the $973.19 unpaid retirement deduction for the period of separation subject to consideration for waiver under 5 U.S.C. 5584? If the deductions are not waivable, the period concerned will be treated as an optional deposit period (i.e., counted for service credit toward eligibility but with a reduction of annuity unless deposit is made)."

Additionally the agency states the following:

"Mr. Moore was advised by the Winema National Forest that he would receive no back pay, and that he would be required to pay for retirement deductions and to refund his lump-sum pay. Mr. Moore has filed an objection to making these payments. We have investigated, and due to the unwarranted delay in taking any action, have advised the employing unit to restore Mr. Moore's annual leave to his account and make it available for his use even though he has not refunded the lump-sum payment. He

> has been advised that your decision will be requested to insure that he has not been denied any benefits to which he is entitled * * *."

The agency states it understands the regulations, which seem quite clear, but in effect it asks that an exception be made in Mr. Moore's case since it feels that applying the total private earnings for the whole period against lost Federal earnings is inequitable in Mr. Moore's case. The agency states that both the Federal and private employment are seasonal in nature; that there were periods of unemployment when Mr. Moore would otherwise have worked for the Forest Service; and that the private earnings were inflated by overtime hours considerably in excess of that which was typical of Forest Service employees in jobs similar to the one from which Mr. Moore was improperly removed. The agency recognizes that its request would require a modification of the guidelines set forth in the Federal Personnel Manual, FPM 990-2, book 550, subshapter S8-7, and Comptroller General decisions, 48 Comp. Gen. 572 (1962) and B-148637, January 29, 1968.

The agency refers to an "equity" concept in the regulations, 5 C.F.R. § 713.271, under Part 713, Equal Opportunity, Remedial Actions. With respect to the instant case, section 713.271(b)(3) (1973), provides that the remedial action for an employee such as Mr. Moore, who was discriminated against, is--

> "(3) Cancellation of an unwarranted personnel action and restoration of the employee."

The only method provided in part 713 for the computation of backpay is that it be computed in the same manner prescribed by 5 C.F.R. § 550.804.

Subsection 550.804(e), which sets forth in part how the backpay due an employee is to be computed, provides:

> "(e) In computing the amount of back pay due an employee under this section and section 5596 of title 5, United States Code, the agency shall deduct the amounts earned by the employee from other employment during the period covered by the corrected personnel action. The agency shall include as other employment only that employment engaged in by the employee to take the place of the employment from which the employee was separated by the unjustified or unwarranted personnel action."

Federal Personnel Manual (FPM) Supplement 990-2, book 550, subchapter 8, at subparagraph S8-5f (January 21, 1969), further explains the requirement of the above regulation as follows:

> "f. Amount of entitlement. When an employee has been separated from his position by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his Government income should have been and the amount which he actually earned in an employment obtained to take the place of his Government employment. If hhe employee had been demoted by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his income should have been in the proper grade and the amount of his income in the lower grade. If the employee were already working in a part-time job at the time of his removal, suspension, or furlough from his Government employment as a result of the unjustified or unwarranted personnel action, the part-time job is not other employment within the meaning of section 5596 of title 5, United States Code, because it does not take the place of the Government employment. If the employee were able to expand his part-time job to a full-time job, or were to take a second part-time job, as a substitute for Government employment, only those hours worked on the full-time job in excess of the aggregate of the hours worked on the part-time job, or only the hours worked on the second part-time job, as the case may be, are considered as other employment in place of Government employment. In other words, the only earnings from other employment that need not be deducted from back pay are earnings from outside employment the employee already had before the unjustified suspension or separation. (See Comptroller General decision B-148637, dated January 29, 1968.) An agency should obtain a statement or affidavit from the employee covering his outside earnings." (Emphasis supplied.)

Thus, the test applied by this Office to determine whether income received is deductible from backpay is based upon a comparison of the outside work performed or income received prior to improper separation and that performed after such separation. In 48 Comp. Gen. 572, it was held that the law does not contemplate a daily or weekly comparison of the backpay with the employee's outside earnings, but rather the total amount of outside earnings is compared with the total amount of backpay. This principle was subsequently incorporated in the FPM Supplement. Therefore, we find no basis in the applicable law or regulation that would permit an affirmative answer to the agency questions 1 and 2 and, accordingly, they are answered in the negative.

With respect to question 3, we point out that the lump-sum leave payment made at the time of Mr. Moore's separation was proper. The fact that he was ordered restored to his position as of the date of his improper separation does not operate to have the retroactive effect of making the lump-sum leave payment erroneous and subject to waiver. See B-175061, March 27, 1972. Therefore, such payment should be collected in accordance with the provisions of 5 U.S.C. § 6306(a) (1970).

In reconstructing Mr. Moore's leave account the annual leave restored may not, under 5 U.S.C. § 5596(b)(2), be credited in an amount that would cause the amount of leave to the employee's credit to exceed the maximum amount of the leave authorized for the employee by law or regulation. The provisions of 5 U.S.C. § 6304(d)(1) (A) (Supp. III, 1973), providing for restoration of annual leave last through administrative error after June 30, 1960, are not for application, since the Civil Service Commission regulations do not consider an unjustified or unwarranted personnel action under section 5596 as an administrative error. See attachment to Federal Personnal Manual Letter No. 630-32, dated January 11, 1974.

With respcet to question 4, 5 U.S.C. § 5596(b)(2), provides that the employee is deemed to have performed service for the agency during theiinterim separation period. Thus, all Federal pay that would have been earned during the interim period is subject to deductions for retirement fund contributionsiin the absence of any civil service regulation stating otherwise. 28 Comp. Gen. 333 (1948); 34 id. 657 (1955). The requirement

for collection of that amount would not be for waiver under 5 U.S.C. § 5584, since no erroneous payment of pay has been made. In this connection the Civil Service Commission, which is responsible for the administration of the civil service retirement system, including the adjudication of claims thereunder, 5 U.S.C. § 8347 (1970), has advised informally that it has no authority to waive payment of the retirement deduction.

R.F. KELLER

Deputy Comptroller General
of the United States