

DECISION

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

FILE: **B-184200**

DATE: **APR 13 1976**

MATTER OF:

Ernest F. Gonzales - Travel and transportation expenses, leave, and attorney's fees incident to an erroneous transfer and recovery of backpay

DIGEST:

1. While the Back Pay Act of 1966 authorizes recovery of pay, allowances and differentials lost by an employee during a period of an erroneous transfer due to erroneous personnel action by an agency, the Act does not authorize recovery of any travel and transportation expenses incurred by the employee incident to the erroneous transfer.
2. Claims for attorney's fees cannot be reimbursed in absence of express statutory authority.

This action is in response to a request for reconsideration of our Transportation and Claims Division (now Claims Division) Settlement dated March 27, 1975, which disallowed the claim of Mr. Ernest F. Gonzales, an employee of Soil Conservation Service (SCS), Department of Agriculture, for (1) travel and transportation expenses in connection with an erroneous transfer from Santa Rosa to Corrales, New Mexico; (2) compensation for annual leave taken as a result of the commuting hardship incident to the erroneous transfer; and (3) attorney's fees incurred in the appeal of the adverse action.

Mr. Gonzales was employed as a Soil Conservation Technician at Santa Rosa, New Mexico, on July 16, 1973, when a Notification of Personnel Action was issued which resulted in a two pay period suspension without pay, a reduction in grade and a transfer from Santa Rosa to the Albuquerque Project Engineer Office in Corrales, New Mexico. It is the reported position of the SCS that a management decision had been made to transfer Mr. Gonzales independent of and prior to the adverse action notification. Mr. Gonzales appealed the adverse action which resulted in its modification on February 6, 1974. The initial penalty was reduced to only the two pay period suspension without pay with the reduction-in-grade cancelled and all rights and benefits ordered to be restored. However, Mr. Gonzales was not reassigned back to Santa Rosa as SCS management officials made the claim that the Soil Conservation Technician position previously held by Mr. Gonzales was abolished on July 22, 1973, as a planned management

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action. Although the claimant had been granted two advances in funds for the purpose of relocating, \$400 in September 1973 and \$250 in January 1974, he elected to commute from Santa Rosa to Corrales and back while awaiting the final adjudication of his appeal. The claim is based on the contention that the transfer was not official until February 24, 1974, as evidenced by the fact that the original transfer action was rescinded on appeal, and the travel authorization dated July 16, 1973, which was the initial transfer was in fact cancelled on February 22, 1974, with a new travel authorization issued on the same date providing for travel to Albuquerque on or about February 24, 1974.

Backpay due to unjustified personnel actions is governed by 5 U.S.C. § 5596 (1970). That statute provides, generally, that an employee who has undergone an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of all or part of his pay, allowances, or differentials is entitled to receive an amount equal to the pay, allowances, or differentials he normally would have received, less amounts earned by him elsewhere during the period. Subsection (c) of the statute directs the Civil Service Commission to prescribe regulations.

Regulations implementing the Back Pay Act have been promulgated by the Civil Service Commission in 5 C.F.R. Part 550, Subpart H. Section 550.804(a) of 5 C.F.R. describes the corrective action which may be taken in the case of an unjustified or unwarranted personnel action. It provides that the agency "shall recompute for the period covered by the corrective action the pay, allowances, differentials, and leave account (limiting the accumulation to the maximum prescribed by law or regulation for the employee) of the employee as if the unjustified or unwarranted personnel action had not occurred and the employee shall be deemed for all purposes to have rendered service in the agency for the period covered by the correction action."

However, nowhere in the Back Pay Act or in the implementing regulations is there any provision for the payment of incidental expenses incurred by an employee as a consequence of an unjustified or unwarranted personnel action. The terms used in both the statute and the regulations--pay, allowances, and differentials--do not include travel, transportation, moving expenses, or leave taken by the employee. This is so since they are incidental expenses incurred by an employee as a consequence of an unjustified or unwarranted personnel action, not allowances that he would have incurred if he had not undergone the improper personnel action. It is clear that the Act authorizes only

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payment of an amount which the employee "normally would have earned" if the erroneous personnel action had not occurred (less any amounts earned by the employee through other employment during the period). 5 U.S.C. § 5596(b)(1). Also, travel, transportation, and relocation expenses are not included in the terms "allowances" and "differentials." Cf. 5 U.S.C. § 5584 (Supp III, 1973), wherein such expenses are expressly excluded from overpayments of pay which may be waived when collection would be against equity and good conscience and not in the best interests of the United States. B-182282, May 28, 1975; B-181514, May 9, 1975. Although the claimed expenses may be a consequence of the erroneous transfer, they are not allowances that Mr. Gonzales would have received if he had not undergone the improper personnel action. See B-182282, supra; and B-181514, supra. In view thereof we find no basis under the Back Pay Act for allowing the various expenses allegedly incurred as a consequence of Mr. Gonzales' erroneous transfer. However, section 2-5.2a of the Federal Travel Regulations, FPMR 101-7 (May 1973), implements 5 U.S.C. § 5724a(a)(3) which authorizes subsistence expenses of an employee and his immediate family for a period of 30 days while occupying temporary quarters at a new official station located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or Canal Zone. Therefore, Mr. Gonzales would be entitled to temporary lodging allowance for the first 30 days he spent in other than his permanent quarters at the new duty station pursuant to the travel authorization dated July 16, 1973. This, of course, in no way reduces the subsistence allowance while occupying temporary quarters which Mr. Gonzales might otherwise qualify for pursuant to the travel authorization dated February 22, 1974.

Mr. Gonzales also claims reimbursement for attorney's fees which led to his restoration of grade and return of other rights and benefits on appeal of the initial personnel action. In this regard it is well established that, in the absence of express statutory authority authorizing an allowance for attorney's fees and costs, reimbursement is not permissible. 52 Comp. Gen. 859 (1973); B-178551, January 2, 1976. Since we are unaware of any statutory authority under which Mr. Gonzales' claim for attorney's fees is cognizable, the claim therefor is disallowed and that part of the settlement of the Claims Division is sustained. The case is being referred to our Claims Division for processing of temporary quarters allowance and, after the necessary computations, payment will be made to Mr. Gonzales.

R. F. Keller
Deputy Comptroller General
of the United States