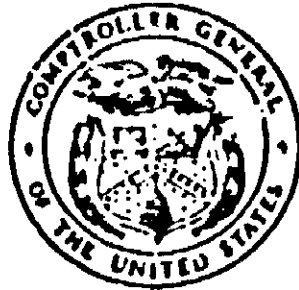


**DECISION**

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

**FILE:** B-206931

**DATE:** August 30, 1982

**MATTER OF:** John H. Kerr - Backpay Computation

**DIGEST:**

1. An employee who successfully appealed his separation from the National Endowment for the Arts before the Merit Systems Protection Board (MSPB), contests the resulting backpay award. He contends he is entitled to reimbursement of moving and storage expenses associated with his separation and subsequent reinstatement, interest on the backpay, and, as compensatory damages, the severance pay which was deducted from his backpay award. Neither the Back Pay Act, 5 U.S.C. § 5596 (Supp. III 1979), nor any other authority provides for payment of interest or compensatory damages. Similarly, there is no provision for payment of incidental expenses such as moving and storage expenses, incurred by an employee as a consequence of an unjustified or unwarranted personnel action. The severance pay was properly deducted from the backpay award.
2. An employee who successfully appealed his separation from his agency before the Merit Systems Protection Board (MSPB), claims reimbursement of legal fees. Since the legal fees claimed relate to the services of an attorney in connection with the appeal to MSPB and not GAO, payment of such fees is for consideration by MSPB under 5 U.S.C. § 7701 (g)(1) (Supp. III 1979).

Any appeal from an adverse decision by the MSPB would be to a Federal court.

5 U.S.C. § 7703 (Supp. III 1979).

This decision is in response to a request from Mr. John H. Kerr, an employee of the National Endowment for the Arts, for a review of our Claims Group's Settlement Certificate Z-2834995, dated February 9, 1982. By that settlement, our Claims Group informed Mr. Kerr that it had found no error in the computation of his backpay award. We concur in that determination.

Mr. Kerr was awarded backpay in connection with a decision of the Boston Field Office of the Merit Systems Protection Board (MSPB), ordering the National Endowment for the Arts to cancel Mr. Kerr's separation from that agency, which had taken place on August 31, 1979. The National Endowment for the Arts petitioned the MSPB for review, but, by a decision dated April 9, 1981, the MSPB denied that petition. By letter dated May 1, 1981, the MSPB informed Mr. Kerr that his claims concerning the amount of backpay or other amounts allegedly due were not within the jurisdiction of the MSPB, but should be directed to the General Accounting Office.

Mr. Kerr was awarded backpay for the period from September 1, 1979, to May 30, 1981, the date the Personnel Officer at the National Endowment for the Arts states his salary resumed. Mr. Kerr received \$38,807.31 in backpay, an amount arrived at after deductions were made for retirement contributions, Federal and state income taxes, and the severance pay Mr. Kerr received at the time of his separation from service.

Mr. Kerr wrote to our Claims Group on October 28, 1981, claiming entitlement to reimbursement of legal fees incurred in connection with his appeal to the MSPB and moving and storage expenses incurred in connection with his separation and subsequent reinstatement. He also contended that he should receive interest on his backpay award and that his severance pay should not have been deducted from his backpay award but rather should have been awarded to him as compensatory damages. Our Claims

Group responded that the computation of Mr. Kerr's back-pay award appeared to be correct and that the Back Pay Act, 5 U.S.C. § 5596 (Supp. III 1979), does not provide for payment of interest, damages, or relocation expenses.

The Back Pay Act provides, generally, that an employee who is found by an appropriate authority to have undergone an unjustified or unwarranted personnel action which results 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.

Regulations implementing the Back Pay Act have been promulgated by the Office of Personnel Management in Title 5, Part 550, Subpart H, of the Code of Federal Regulations. These regulations provide that an agency shall compute for the period covered by the corrective action the pay, allowances, and differentials of the employee as if the unjustified or unwarranted personnel action had not occurred, but in no case will the employee be granted more pay, allowances, and differentials than he or she would have been entitled to if the unjustified or unwarranted personnel action had not occurred. 5 C.F.R. § 550.805 (a,b) (1982).

It is clear that, in accordance with the above, it was proper for the National Endowment for the Arts to deduct Mr. Kerr's severance pay from his backpay award. See Ernest E. Sargent, 57 Comp. Gen. 464 (1978). With regard to his claim that such pay be treated as compensatory damages, we must point out, as did our Claims Group, that the Back Pay Act provides no authority for payment of damages, nor are we aware of any other authority providing for such payment. In this connection see 55 Comp. Gen. 564 (1975).

Similarly, with regard to the payment of interest on backpay awards, it is a well-settled rule of law that interest may be assessed against the Government only under an express statutory or contractual authority. See Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978); Gene A. Albarado, 58 Comp. Gen. 5 (1978); 54 Comp. Gen. 760 (1975); and 45 Comp. Gen. 169 (1965). Neither the Back Pay Act nor

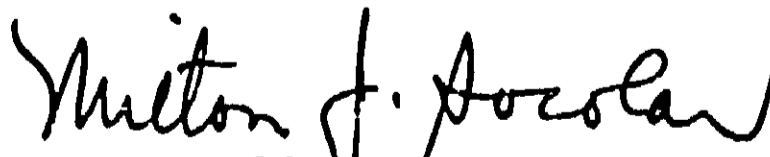
B-206931

any other applicable statute specifically provides for the payment of interest on retroactive awards of backpay resulting from an unjustified or unwarranted personnel action. Therefore, Mr. Kerr is not entitled to receive interest on his backpay award.

Mr. Kerr is not entitled to receive reimbursement for any moving or storage expenses. There is no provision in the Back Pay Act or its implementing regulations for the payment of incidental expenses incurred by an employee as a consequence of an unjustified or unwarranted personnel action. It is clear that the Act authorizes only payment of an amount the employee would have received if the erroneous personnel action had not occurred. Therefore, although the expenses for which Mr. Kerr claims reimbursement may have been due to his separation and subsequent reinstatement, they are not allowances Mr. Kerr would have received if he had not undergone the erroneous personnel action. See Ernest F. Gonzales, B-184200, April 13, 1976, and David C. Carrson, B-182282, May 28, 1975.

The legal fees for which Mr. Kerr seeks reimbursement are for services performed by his attorney in connection with his appeal to the MSPB. The MSPB is authorized to award attorney fees in accordance with 5 U.S.C. § 7701(g)(1) (Supp. III 1979) to employees who prevail on appeal in certain situations. We have been informed by the National Endowment for the Arts that the question of attorney fees is still before the MSPB. Although 5 C.F.R. § 550.806(a) also provides authority for the award of reasonable attorney fees, there is no basis upon which this Office can award attorney fees to Mr. Kerr since it appears he did not use the services of an attorney in connection with his appeal before this Office. Furthermore, we would like to point out that the only appeal from any determination the MSPB may make in this regard is to the United States Court of Claims or a United States Court of Appeals. See 5 U.S.C. § 7703 (Supp. III 1979) and Cox and Hawes, B-202849, March 9, 1982.

The determination of our Claims Group is hereby upheld.

  
Acting Comptroller General  
of the United States