DECISION

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

Gibson 24379

FILE: B-207148 **DATE:** March 1, 1983

MATTER OF: B. Riley McClelland - Deductions from Backpay - Outside Earnings

DIGEST:

1. An employee who was determined to have been improperly separated from his position and was reinstated with backpay disputes the employing agency's determination that fellowship monies he received during the period of the improper personnel action must be deducted from backpay. Fellowship monies paid to an employee for the primary purpose of furthering his education and training, and not as compensation for his services, are not deductible from backpay since such monies do not constitute "amounts earned * * * through other employment" within the meaning of the ~~Back~~ Pay Act, 5 U.S.C. § 5596 (Supp. IV 1980).

2. An employee who was determined to have been improperly separated from his position disputes the employing agency's determination to deduct amounts the employee earned through employment during the period of the corrected action, alleging that such employment was not engaged in to "take the place of" his Government employment since he orally agreed to engage in the employment prior to his separation, and the work could have been performed in addition to his Government duties. In accordance with A. Earnest Fitzgerald, 53 Comp. Gen. 824 (1974), the amounts in question were properly deducted from backpay since there is no evidence that the employee actually was engaged in outside work prior to his separation.

The American Federation of Government Employees (AFGE), on behalf of Mr. B. Riley McClelland, an employee of the U.S. Department of the Interior, National Park Service, appeals our Claims Group settlement Z-2837732, dated March 26, 1982, which determined that fellowship monies and compensation for part-time employment received by the employee during the period of an improper separation must be deducted from backpay. For the reasons stated below, we reverse in part and sustain in part our Claims Group settlement.

On July 27, 1973, Mr. McClelland was removed from his position as Park Ranger, grade GS-11. After exhausting his administrative remedies, the employee on November 25, 1975, sued in Federal court for restoration of his job with backpay and other benefits. On May 12, 1976, the District Court for the District of Columbia (D.C. Civil Action No. 75-1969) dismissed the claimant's action. Mr. McClelland appealed the dismissal to the Court of Appeals and on August 17, 1979, that Court vacated the judgment of the District Court and remanded the action with instructions to the District Court to remand it to the Civil Service Commission (now Office of Personnel Management). McClelland v. Andrus, 606 F.2d 1278 (D.C.C. 1979). Following remand, the Department of the Interior and the employee entered into a settlement agreement, dated August 7, 1980, in which the parties stipulated that Mr. McClelland had been subject to an unwarranted personnel action and that he was entitled to reinstatement with backpay "to the full extent permitted under the law * * *." In computing Mr. McClelland's backpay for the period July 27, 1973, to September 1, 1980, the agency deducted $1,533.30 the employee received from the University of Montana as fellowship monies in 1973 and 1974, and $8,061.51 he received as compensation for research work performed for the University of Montana, apparently under a grant from the U.S. Department of Agriculture, Forest Service, from 1975 to 1979.

The AFGE, on behalf of Mr. McClelland, filed a claim with our Claims Group, contending that the agency improperly deducted from the employee's backpay the fellowship grant and monies he received through his employment with the

University of Montana. By settlement dated March 26, 1982, our Claims Group denied the employee's claim, determining under 5 U.S.C. § 5596 (Supp. IV 1980) that the amounts were properly deducted from backpay because the employee had failed to show that he had received fellowships from, or engaged in employment with, the University of Montana prior to his separation. On appeal, AFGE renews its contentions that the fellowship grant and research salary were improperly offset against backpay. The union's specific arguments and our opinion follow.

Fellowship Grant

The AFGE maintains that the fellowship monies received by Mr. McClelland may not be offset against backpay because they do not constitute "amounts earned * * * through other employment" within the meaning of 5 U.S.C. § 5596. In support of this position, the union has submitted copies of Mr. McClelland's Federal income tax returns for 1973 and 1974, showing that the employee deducted the fellowship monies from gross income in both years. Attached to each return is Mr. McClelland's statement that the monies were not received as payment for services, and a letter from the Dean of the School of Forestry, University of Montana, explaining that the payments made to the employee were for the "primary purpose of enabling the recipient to carry on studies and research in the furtherance of his own education."

An employee is entitled to backpay after being found to have undergone an unjustified or unwarranted personnel action under the authority of the Back Pay Act of 1966, Public Law 89-380, codified at 5 U.S.C. § 5596. That Act provides that the measure of backpay to be awarded the employee upon correction of an unwarranted personnel action is the amount of pay, allowances, or differentials that the employee normally would have earned during the period in question, less "any amounts earned by him through other employment during that period," and it is provided that the employee "for all purposes, is deemed to have performed service for the agency during that period * * *." There is nothing in the legislative history of the Act to indicate

that Congress intended the words "amounts earned through other employment" to include sums other than those acquired by the employee on account of his labor, service, or performance.

We do not believe that a fellowship grant, the primary purpose of which is to further the recipient's education and training, can be characterized as compensation for an employee's services. Although study or research undertaken in an educational program may incidentally benefit a grantor, the term "fellowship" connotes a purpose of assistance, in contrast to the self-interest of an employer in the compensation of his employee. See generally Ussery v. United States, 296 F.2d 582 (5th Cir. 1961). Additionally, we note that Section 117 of the Internal Revenue Code excludes from gross income "any amount received * * * as a fellowship grant, * * *" [26 U.S.C. § 117 (1976)], and it has been held that a fellowship does not constitute "employment" for purposes of determining eligibility for unemployment compensation benefits. Knee v. Commonwealth Unemployment Compensation Board of Review, 415 A.2d 1008 (Pa. 1980).

On this basis, we hold that the fellowship monies awarded to Mr. McClelland for the purpose of furthering his research and education are not "amounts earned * * * through other employment" within the meaning of 5 U.S.C. § 5596, and, therefore, the amounts are not deductible from the employee's backpay.

Amounts Earned Through Research Activities

As noted previously, the Department of the Interior, in computing Mr. McClelland's backpay, deducted $8,061.51 earned by the employee through research work performed for the University of Montana, apparently under a grant from the Forest Service, during the period 1975 to 1979. The AFGE asserts that our Claims Group improperly based its determination that the research monies were deductible from backpay on provisions in Federal Personnel Manual (FPM) Supplement 990-2, Book 550, subchapter 8, subparagraph S8-5f (March 1969), which state that "* * * the only earnings from

other employment that need not be deducted from backpay are earnings from outside employment the employee already had before the unjustified suspension or separation." The union maintains that the provision in the FPM Supplement relied upon by our Claims Group is inconsistent with, and, therefore, overridden by, section 550.805(e)(2), Title 5, Code of Federal Regulations (C.F.R.). Section 550.805(e)(2) provides that, in computing backpay, the agency shall deduct only those amounts earned by the employee through employment engaged in "to take the place of" the employment from which he had been separated.

The language in FPM Supplement 990-2, Book 550, subchapter 8, subparagraph S8-5f, to which the union objects, has been deleted in superseding instructions issued by the Office of Personnel Management (OPM). See FPM Supplement 990-2, Book 550, Subchapter 8 (June 1977). The current instructions pertaining to deduction of interim earnings from backpay, set forth in subparagraph S8-6e(2) of the revised FPM Supplement, apply the test prescribed in 5 C.F.R. 550.805(e)(2) as follows:

"Setoff for part-time employment.

> An employee improperly separated from the Federal service and subsequently reinstated is entitled to back pay for the period of the separation less any amounts received from other employment when such employment took the place of the terminated Federal employment. If the employee was engaged in outside employment prior to the separation, this part-time employment does not constitute 'other employment' within the meaning of section 5596 of Title 5, United States Code, and the monies received therefrom are not deductible from the gross back pay * * *." (Emphasis added.)

It is clear that the above-quoted instruction explains the requirements of, and does not prescribe rules which conflict with, the provisions of 5 U.S.C. § 5596 and implementing regulations contained in 5 C.F.R. Part 550.

Our decisions applying the backpay laws, discussed more fully below, support OPM's construction of the statutory phrase "other employment" to exclude part-time employment engaged in subsequent to the erroneous separation if also shown to have been engaged in by an employee prior to his separation. Even if we did not concur with OPM's explanation of the test stated in 5 C.F.R. 550. 805(e)(2), we would be required to accord great deference to the interpretation of OPM, since that agency promulgated the backpay regulations. See Udall v. Tallman, 380 U.S. 1 (1964); Bowles v. Seminole Rock & Sands Co., 325 U.S. 410 (1945). In any event, we agree with the union's assertion that the rules set forth in 5 C.F.R Part 550 govern the resolution of Mr. McClelland's claim.

Under the test stated in 5 C.F.R. 550.805(e)(2), AFGE argues that Mr. McClelland's employment was not engaged in "to take the place of" his employment with the Park Service because he made an oral commitment to perform the research projects for the University of Montana prior to his separation and, had he not been separated, would have worked for the University during a 5-week period of annual leave each year from 1975 to 1979. On this basis, the union contends that the portion of Mr. McClelland's salary allocable to the periods of annual leave during which he would have worked for the University had he not been separated may not be offset against backpay.

Applying the provisions of 5 U.S.C. § 5596 and implementing regulations contained in 5 C.F.R. Part 550, we have held that the test to determine whether income received is deductible from backpay is not whether the work generating the income could have been performed in addition to the employee's Government duties. Rather, the determination is based upon a comparison of the outside work performed or income received prior to the improper separation and that performed after such separation. A. Ernest Fitzgerald, 53 Comp. Gen. 824 (1974). Thus, interim earnings must be offset against backpay unless the employee demonstrates that such earnings actually were a part of his regular income prior to the suspension or separation; the fact that the employee may have intended to supplement his

Government income prior to his separation is irrelevant. See B-150550, January 28, 1963; and compare B-178143, July 9, 1973.

Although Mr. McClelland may have orally agreed to perform research services for the University of Montana prior to his separation from the Park Service, he had no income from such employment prior to his separation. Therefore, the employee has failed to demonstrate that any part of the amount he received from the University would have accrued to him had he not been separated. Accordingly, under the rules stated in A. Ernest Fitzgerald, above, the full amount earned by the employee through his employment with the University must be deducted from backpay.

Accordingly, we reverse our Claims Group's determination that fellowship monies the employee received during the period of the improper personnel action must be deducted from backpay, and sustain the determination that amounts earned by the employee during the period of the corrected action must be offset against backpay in the absence of evidence that the employee was engaged in outside work prior to his separation.

Milton J. Socolar
for Comptroller General
of the United States