



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Orlan Wilson - Backpay - Improper Retirement

**File:** B-223118

**Date:** January 2, 1987

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### **DIGEST**

1. Employee whose retirement application was disallowed by Office of Personnel Management after separation from General Services Administration claims backpay, alleging that disallowance and separation were due to agency error. In view of the responsibility of an agency to maintain retirement records and to counsel employees with regard to their retirement rights, where an employee's retirement was induced by administrative error and the employee is subsequently restored to the rolls of the agency, the employee is entitled to backpay for the period he was off the employment rolls.

2. Neither the Back Pay Act, 5 U.S.C. § 5596, nor implementing regulations which prescribe allowable payments when an employee undergoes an unwarranted personnel action authorize consequential relocation and moving expenses when an employee is erroneously separated. Although such expenses may result from an improper personnel action, they do not represent benefits an employee would have received had the personnel action not occurred. However, relocation and moving expenses in connection with a restored employee's transfer may be allowed where the employee would have received such benefits but for the personnel action.

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### **DECISION**

This decision is in response to a request for an advance decision from Larry S. Golden, Chief, Accounts Payable Branch, General Services Administration, Region 6, Kansas City, Missouri. Mr. Golden has requested our opinion concerning the claim of Mr. Orlan Wilson for backpay from September 1, 1984, through November 12, 1985. Since Mr. Wilson's retirement was induced by administrative error and he was subsequently restored to the rolls of the agency,

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Mr. Wilson is entitled to backpay for period he was off the employment rolls, and to other allowances discussed below.

#### BACKGROUND

Prior to September 1984, Mr. Orlan Wilson was employed by the General Services Administration (GSA) as an Automotive Mechanic Helper, WG-5, in Vernal, Utah, which is part of the GSA's Region 8, with the Regional Office located in Denver, Colorado. The GSA advises that in early 1984, Region 8's motor pools were being reorganized and staff reductions were occurring. Region 8 Federal Supply Service (FSS), the GSA organization responsible for motor pools, was attempting to accomplish reductions with the least possible impact, and employees were being asked concerning their willingness to retire or to otherwise separate from government service. In April 1984, Mr. Wilson visited the GSA Personnel Office in Denver to assess his eligibility for discontinued service retirement and was apparently advised that he was eligible to file retirement application forms. This understanding was also shared by Region 8 management which understood that Mr. Wilson was eligible for retirement and on this basis decided to eliminate his position. Accordingly, Mr. Wilson was issued a reduction-in-force (RIF) notice on July 9, 1984. Mr. Wilson then filed his retirement application with GSA personnel on August 13, 1984, and he was separated by involuntary retirement on September 1, 1984.

Mr. Wilson's RIF notice listed his service computation date as May 16, 1962. His retirement application was certified as to his eligibility by the Denver Regional Office, processed, and sent to the Office of Personnel Management (OPM). The record shows that incident to his retirement Mr. Wilson moved to California and purchased a residence. On September 25, 1985, OPM notified GSA Personnel that Mr. Wilson's retirement had been disallowed because of inadequate service and his separation was changed from retirement to involuntary termination. The worksheet prepared by the Denver Regional Office showing his service date for retirement as May 16, 1962, was in error; the correct date of October 4, 1969, would have reflected his ineligibility for discontinued service retirement by 5 years. Although the record does not demonstrate precisely what service was claimed in support of Mr. Wilson's retirement, OPM disallowed his request for retirement on the grounds that he did not have sufficient creditable civilian service and that he had not waived his military retired pay

so that he could count his military service for civil service retirement purposes.<sup>1/</sup>

Mr. Wilson was reemployed in Denver as a GS-6 on November 12, 1985. Based on the administrative error in the computation of his creditable service, Mr. Wilson now asserts that he would not have separated had he been aware of his retirement ineligibility but rather would have accepted an offer in Denver, and therefore seeks retroactive reinstatement to the date of his erroneous retirement, full credit for retirement and benefit purposes for his time off the employment rolls, backpay, full leave accrual for the period separated, and relocation expense reimbursement. The agency points out that Mr. Wilson's actions seeking reinstatement to government service in 1985 and his move from California to Denver at his own expense to accept a position support his claim. GSA further asserts that in the event that Mr. Wilson would have had to be separated, rather than involuntarily retired, the agency would have offered him a WG-5 in Denver which was being filled at that time, and would have paid relocation expenses. In fact, the agency reports, this is precisely the action they took in the cases of nine other employees similarly situated at the same time as Mr. Wilson. -

#### OPINION

Backpay is governed by 5 U.S.C. § 5596 and the implementing regulations and instructions of the Office of Personnel Management in 5 C.F.R. §§ 550.801 et seq. These authorities provide that backpay may be awarded upon a finding that an employee has undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of any part of the pay of the employee. Benjamin C. Hail, B-216573, February 11, 1985. An unjustified or unwarranted personnel action is an act or omission which violates or improperly applies the requirements of a nondiscretionary provision. A nondiscretionary provision is any provision of law, Executive Order, regulation, personnel policy issued by

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<sup>1/</sup> Although military service may generally be counted as creditable service, it may not be credited if an employee is receiving military retired pay, unless he waives that pay. There are certain exceptions to this rule relating to disability retirement, none of which are relevant here. See 5 C.F.R. § 831.301(a) and paragraph S3-5a of FPM Supp. 831.1.

an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria. Administrative errors are considered to be a form of an unjustified or unwarranted personnel action. Linnie V. Blevins, B-204876, June 14, 1982.

The agency directly supports Mr. Wilson's contentions that both he and Region 8 FSS management were erroneously advised concerning Mr. Wilson's eligibility for discontinued service retirement. The agency admits that its personnel office misinterpreted the creditable service requirements for optional retirement in Mr. Wilson's case and assisted him in submitting a retirement application based on that misinterpretation. In view of the responsibility of an agency to maintain retirement records and to counsel employees with regard to their retirement rights, if an employee's retirement is induced by administrative error and the employee is subsequently restored to the rolls of the agency, even if the retirement is voluntary, the employee is entitled to backpay for the period he was off the employment rolls. B-175498, June 20, 1972; B-174199, December 14, 1971; B-166062, July 1969. We conclude that Mr. Wilson suffered an unwarranted or unjustified personnel action, and that he is entitled to be retroactively restored to the rolls for the period of September 1, 1984, to November 12, 1985, with appropriate backpay.

#### BACKPAY ENTITLEMENT

In computing the pay and allowances of an employee who has undergone an unjustified or unwarranted personnel action, the agency is responsible for determining the exact amount of pay the employee would have earned had the improper personnel action not occurred. Generally, we have held that the Back Pay Act does not authorize payment of travel, transportation, or moving expenses when they are incidental expenses incurred by an employee as a consequence of the unwarranted personnel action. Such expenses are not allowances that the employee would have received if he had not undergone the improper personnel action. Jack M. Haning, 63 Comp. Gen. 170 (1984). Here, however, as a result of the improper personnel action Mr. Wilson was denied certain travel and transportation allowances which he would have received but for the improper personnel action. Those allowances may be paid under the Back Pay Act. Ralph C. Harbin, 61 Comp. Gen. 57 (1981). See also FPM Ch. 550, § 8-5a (Inst. 262, May 7, 1981), distinguishing incidental expenses from allowances constituting a

form of remuneration for services an employee would have performed had he not been separated.

In the circumstances of Mr. Wilson's case, the agency has made it clear that but for the improper personnel action, he would have been relocated at government expense to a WG-5 position in Denver, Colorado. In computing Mr. Wilson's backpay entitlement, the agency now poses the following specific questions:

- "(1) Our Denver transportation office has prepared a cost comparison indicating that the employee would have been authorized movement and storage of his household goods under the Government Bill of Lading method. Since the employee actually moved from California to Denver, would the employee's submission of satisfactory evidence of weight and expense of household goods moved from California to Colorado be acceptable as a basis for reimbursement"?

As indicated above, the Back Pay Act does not authorize consequential relocation and moving expenses when an employee is erroneously separated. See also, Sammy H. Marr, B-178551, January 2, 1976. Rather, the Back Pay Act authorizes only those payments which the employee would have been entitled to had the improper personnel action not occurred. Accordingly, there is no legal basis for allowing moving expenses for Mr. Wilson's relocation from California to Denver, Colorado. Rather, Mr. Wilson's relocation entitlement must be determined based on the revised travel order and the applicable statutes and regulations. Under the revised travel order, incident to his employment in Denver, Mr. Wilson is entitled to relocation expense entitlements for himself and his household goods directly from Vernal, Utah, to Denver, Colorado. See Ralph C. Harbin, 61 Comp. Gen. 57, supra.

The authority for transportation of household goods at government expense is contained at 5 U.S.C. §§ 5722-5729; the broadest of those authorities applicable to transfers is contained at 5 U.S.C. § 5724(a)(2), which authorizes an employee to ship 18,000 pounds of household goods and personal effects where the transfer is deemed to be in the government's interest. Under 5 U.S.C. § 5724(c) an employee

transferred within the continental United States may be reimbursed for transportation of household goods on a commuted-rate basis in lieu of being paid for his actual expenses. As a result, the employee's submission of satisfactory evidence of weight and expense of household goods moved from California to Colorado would be acceptable as forming the basis for reimbursement up to the constructive cost of moving those household goods from Vernal, Utah, to Denver, Colorado. Thus, in total, Mr. Wilson is entitled to be reimbursed for the cost of the transportation of his household goods from California to Denver, Colorado, not to exceed the cost of shipping the same weight of household goods from Vernal, Utah, to Denver, Colorado.

- "(2) The employee has requested reimbursement for purchase of residence in California in lieu of purchase in Colorado. If the employee claim for real estate expenses are otherwise allowable, would his claim be acceptable?"

There is no doubt that Mr. Wilson would have been entitled to residence transaction expenses incurred in the purchase of a residence at Denver, Colorado, incident to the transfer which the agency asserts would have taken place but for the improper personnel action associated with Mr. Wilson's involuntary retirement. It follows that the effect of paying expenses for the purchase of a Denver residence would serve to restore a monetary benefit that Mr. Wilson would have received but for the improper personnel action. However, the California residence transaction expenses are only a consequence of the erroneous separation insofar as the California residence would not have been purchased but for the erroneous separation. The key here is that Mr. Wilson should obtain neither penalty nor profit from the government's unjustified action; rather, he should be made whole. As a result, Mr. Wilson should not be penalized by having to forego reimbursement of residence transaction expenses he actually incurred in ultimately locating at Denver as he would have had the unjustified personnel action not taken place. However, he may not substitute the California residence transaction expenses he incurred as a consequence of the agency's actions in lieu of actually incurred costs of locating at Denver. If Mr. Wilson did not incur any reimbursable costs in locating at the new duty station in

Denver, then there is no reimbursement entitlement for residence transaction expenses.

- "(3) The employee has requested reimbursement of temporary quarters based on allowable rates. Would the employee's claim for reconstructed actual expenses noting the absence of receipts be acceptable"?

The Harbin decision, supra, indicates that temporary quarters subsistence allowance which would have been received but for the improper personnel action may be paid under the Back Pay Act. In the context of the question presented here, which requires reconstruction of expenses without actual receipts or documented itemizations, reimbursements authorized by the agency are subject to the following cautionary note.

Regulations implementing the temporary quarters subsistence expense (TQSE) entitlements of 5 U.S.C. § 5724a(a)(3) require receipts for lodging, laundry and cleaning expenses. See Federal Travel Regulations, FPMR 101-7 para 2-5.4b (Supp. 10 November 14, 1983) (FTR), incorp. by ref., 41 C.F.R. § 101-7.003 (1984). Under this authority an employee may be reimbursed for the expenses of the occupancy of temporary quarters in connection with an official transfer to a new duty station. Reimbursement of TQSE is discretionary with the agency, and in the absence of an administrative authorization or approval of the use of temporary quarters, an employee may not be reimbursed for TQSE. In the circumstances of computation of backpay based on administrative error, the employee's voucher for TQSE may be certified for payment only after the expenses were actually incurred and properly approved by the agency. See, e.g., John A. Orris, 58 Comp. Gen. 652 (1979).

This same authority requires actual expenses to be itemized in a manner prescribed by the head of the agency that will permit at least a review of the amount spent daily for lodging, meals, and other items. Although the regulations do not require a meal-by-meal statement of that cost, they do require the actual amount spent be shown, and it is the responsibility of the employing agency, in the first instance, to determine that subsistence expenses are reasonable. The fact that the expenses claimed are within the maximum amount specified in FTR para. 2-5.4c does not automatically entitle the employee to reimbursement. Rather,

an evaluation of reasonableness must be made on the basis of the facts in each case. See, e.g., 52 Comp. Gen. 78 (1972).

"(4) Would the employee's obligation to remain in government service for 1 year be based on actual reporting date to the Denver office"?

Mr. Wilson has now served more than a year in Denver since his reinstatement and, therefore, whether his service obligation should be established from the reconstructed date of transfer or the actual reporting date is an academic issue, because he has completed his obligation measured from either date.

*for* *Harry R. Van Cleave*  
Comptroller General  
of the United States