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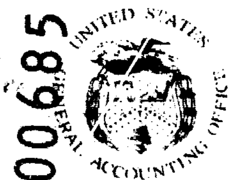
Third parties under the Federal labor-management relations program adjudicate a wide range of issues, and the remedies they offer must conform to the requirements of law and regulation. GAO prepared the manual to assist third parties in fashioning remedies consistent with Federal statutes and regulations. The manual details the available remedies for the most common cases requiring make-whole remedies. It is divided into separate issue areas: discharges or suspensions; demotions; promotions; leave; overtime compensation; resignation or voluntary reduction in rank; equal employment opportunity violations; work assignment; pay; and miscellaneous cases. Each issue area has a general description of the type of case involved and the determination a third party must make to permit a particular remedy. Also listed are available remedies and their effective dates, the statutory authorities, and recent Comptroller General decisions as references. (Author/QM)



UNITED STATES
GENERAL ACCOUNTING OFFICE

Manual On Remedies Available To Third Parties In Adjudicating Federal Employee Grievances

Third parties under the Federal labor-management relations program adjudicate a wide range of issues, and the remedies they offer must conform to the requirements of law and regulation. Therefore, GAO prepared this manual to assist third parties in fashioning remedies consistent with Federal statutes and regulations. The manual details the available remedies for the most common cases requiring make-whole remedies. It does not intend to cover all situations, because many cases are unique.

The Comptroller General has a statutory responsibility to review awards in which agency officials question the propriety of Federal expenditures ordered by a third party. Under 31 U.S.C. 74 and 82 (d), disbursing officers, certifying officers, and heads of Government departments or establishments have the right to apply for and obtain advance decisions from the Comptroller General on any question of law involved in the expenditure of Federal funds, including those ordered by a binding arbitration award, Assistant Secretary of Labor decision, or Federal Labor Relations Council decision.

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FOREWORD

With the recent expansion of the Federal labor-management relations program, arbitration has become an important procedure for adjudicating employee grievances. Currently most collective bargaining agreements contain provisions that require binding arbitration when the parties are unable to informally adjust such grievances. Similarly, other third-party activity has expanded to encompass a wide range of issues.

The Assistant Secretary of Labor for Labor Management Relations is authorized to hear unfair labor practice complaints and to require that agencies and labor organizations take appropriate affirmative action when unfair labor practices are found. This authority enables the Assistant Secretary to order agencies to take corrective action consistent with laws and regulations when an employee has been discriminated against because of union activitiy.

As a third-party agency, the Federal Labor Relations Council has the primary responsibility under Executive Order 11491, as amended, of reviewing arbitration awards and Assistant Secretary decisions in which either party files an appeal. The Comptroller General has a statutory responsibility to review awards in which agency officials question the propriety of Federal expenditures ordered by a third party. In this regard, under 31 U.S.C. 74 and 82(d), disbursing officers, certifying officers, and heads of Government departments or establishments have the right to apply for and obtain advance decisions from the Comptroller General on any question of law involved in the expenditures of Federal funds, including expenditures ordered by a binding arbitration award, Assistant Secretary decisions, or Federal Labor Relations Council decisions.

Since all Federal expenditures must be authorized by law or regulation, it is important that monetary awards conform to this criterion.

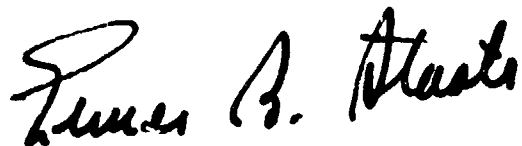
Consequently, this manual has been prepared to help third parties fashion remedies consistent with Federal statutes and regulations. In the Federal sector, remedies must conform to the requirements of law and regulations. The Back Pay Act, 5 U.S.C. 5596 (1970), is the single most comprehensive statutory remedy for Federal employees who have been wrongfully deprived through an agency action of pay, allowances, or differentials. This manual details the remedies

available to third parties in adjudicating employee grievances in certain situations, emphasizing backpay remedies. Examples in this manual are the most common cases that require monetary make-whole remedies. Because many cases are unique, however, not all situations are covered. We have also included some issues normally covered by statutory appeals procedures.

The manual is divided into separate issue areas--discharges or suspensions, demotions, promotions, leave, overtime compensation, etc. Each issue area has a general description of the type of case involved and the determination a third party must make to permit a particular remedy. Also listed are available remedies and their effective dates, the statutory authorities, and recent Comptroller General decisions as references. Additionally, the appendixes provide supplemental information concerning pertinent laws, regulations, and Comptroller General decisions.

We have solicited and incorporated the views of various Federal agencies in writing this manual. The Department of Labor, the Civil Service Commission, the Federal Mediation and Conciliation Service, and the Federal Labor Relations Council have commented on a draft. Their views have helped to refine this manual.

Finally, recognizing the dynamic nature of this subject, we plan to update the manual as changes in laws, appropriate regulations, and Comptroller General decisions occur. The effects of such changes on the available remedies will be considered and incorporated. We hope this manual will promote better understanding of the available make-whole remedies and contribute to a responsive labor-management relations program. We would appreciate the comments and suggestions of those who use this manual on how it may be improved.



Comptroller General
of the United States

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ABBREVIATIONS

AWOL	absence without leave
B-______	Six digit number refers to Comptroller General decision
Comp. Gen.	Comptroller General
CSC	Civil Service Commission
FLSA	Fair Labor Standards Act
GS	general schedule
LWOP	leave without pay
WG	wage system

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CHAPTER 1

DISCHARGE OR SUSPENSION (See note.)

Type of case:	An employee is discharged or suspended from a position as a result of unsatisfactory work performance; a serious employee action, such as theft; or a relatively serious disciplinary problem, such as insubordinate conduct or unexplained or unexcused absences.
Determination:	The discharge or suspension (1) is an unjustified or unwarranted personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)
Available remedies:	Restore employee retroactively to position with backpay and leave (see "Back Pay Act," app. I), reinstatement of Government life insurance (see app. III), and option of retroactive reinstatement of prior health insurance or enrollment in new health insurance plan of choice (see app. III). or Recommend a lesser disciplinary sanction (such as reducing it to a suspension, reducing the length of suspension, or issuing a letter of reprimand) with backpay, as appropriate, (see "Back Pay Act," app. I) and, if applicable, reinstate Government life insurance (see app. III) and provide option of retroactive reinstatement of prior health insurance or enrollment in new health insurance plan of choice (see app. III).
Effective date of remedies:	The effective date of the unwarranted or unjustified removal or suspension.
Note:	Discharges and suspensions of over 30 days are adverse actions, as defined in 5 U.S.C. 7511(2) (1970), for which statutory appeal procedures are available and are thus precluded from the

coverage and scope of a negotiatied grievance procedure under section 13(a) of Executive Order 11491, as amended. Therefore, they are not subject to arbitration.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970); 5 U.S.C. 8908; and 5 U.S.C. 8706(f) (supp. III, 1973).

Reference: B-162578, May 6, 1974.

CHAPTER 2

DEMOTION (See note.)

Type of case:	An employee is demoted to a lower grade or position. (For example, the alleged demotion may involve a change from one pay system to another, as from the general schedule (GS) to prevailing rate system. In such cases, the demotion must result in a lower rate of pay when representative rates are compared.)
Determination:	The demotion (1) is an unjustified or unwarranted personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)
Available remedies:	Restore employee retroactively to position held at time of demotion with backpay. (See "Back Pay Act," app. I.) or Recommend a lesser disciplinary sanction (such as letter of reprimand) and retroactive restoration to position with backpay. (See "Back Pay Act," app. I.)
Effective date of remedies:	The effective date of the unwarranted or unjustified demotion.
Note:	Demotions are adverse actions, as defined in 5 U.S.C. 7511(2) (1970), for which statutory appeal procedures are available and are thus precluded from the coverage and scope of a negotiated grievance procedure under section 13(a) of Executive Order 11491, as amended. Therefore, they are not subject to arbitration.
Authority:	Back Pay Act of 1966, 5 U.S.C. 5596 (1970).

References: Schweizer v. United States, 128 Ct. Cl. 456, 121 F. Supp. 928 (1954), and Salter v. United States, 188 Ct. Cl. 524, 412 F. 2d 874 (1969).

CHAPTER 3

PROMOTION

SITUATION 1

Type of case: An eligible employee is denied a promotion in violation of Civil Service Commission (CSC) requirements for promotion programs, the agency's negotiated procedure, or the agency's promotion plan as incorporated in the agreement or applicable law.

Determination: The grievant would have been promoted "but for" the agency's violation of its negotiated procedure or promotion plan, and thus the denial (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the grievant's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Promote grievant retroactively to position with backpay. Order the agency to vacate the position in dispute consistent with appropriate regulation. (See "Back Pay Act," app. I.)

Effective date of remedy: The date the grievant would have been promoted "but for" the unjustified or unwarranted personnel action.

Authority: Federal Personnel Manual, Ch. 335, Sec. 6-4, and Back Pay Act of 1966, 5 U.S.C. 5596 (1970).

Reference: 54 Comp. Gen. 312 (1974).

SITUATION 2

Type of case: Same as situation 1.

Determination: The agency's promotion decision was defective because it did not conform to the negotiated agreement or the agency promotion plan, as incorporated in the agreement; but it cannot be determined

	that the grievant would have been promoted "but for" the defectiveness of the process.
Available remedy:	Direct that the promotion action be reconstituted so that the grievant may be properly considered for the position; or alternatively, depending on the situation, direct that the grievant be given priority consideration for the next promotion.
Effective date of remedy:	Prospective.
Authority:	Federal Personnel Manual, Ch. 335, Sec. 6-4.
Reference:	None

SITUATION 3

Type of case:	Same as situation 1.
Determination:	The grievant did not receive proper consideration for the position in question; however, the selection process was not so defective as to warrant a new process.
Available remedy:	Direct the agency to correct systemic defect or error that led to improper consideration of the grievant.
Effective date of remedy:	Prospective.
Authority:	Federal Personnel Manual, Ch. 335, Sec. 6-4.
Reference:	None

CONSIDERATIONS IN DIRECTING PROMOTIONS

Note 1:

Subject to the requirements outlined below, the Whitten Amendment (5 U.S.C. 3101 Note) requires generally that a classified employee of grades GS-5 or above serve 1 year in the next lower grade before being eligible for either a temporary or permanent promotion. To the extent this requirement has not been fulfilled, the grievant may not be retroactively promoted. The amendment requires as follows: (a) An agency may advance an employee to a position at GS-12 or above only after the employee has served 1 year at the next lower grade. (b) An agency may advance an employee to a position GS-6 th ough GS-11 only after the employee has served 1 year at the next lower grade, when the position to which the employee is advanced is in a line of work classified at one-grade intervals, or after the employee has served in a position two grades lower, when the postition to which the employee is advanced is in a line of work classified at two-grade intervals. (c) An agency may advance an employee to a position at GS-5 or below which is not more than two grades above the lowest grade held within the preceding year under a nontemporary appointment. Exception: To avoid undue hardship or inequity, an agency head may request CSC to waive this requirement and authorize promotions in individual cases of a meritorious nature. However, CSC has advised us that they rarely approve such requests for waivers.

Note 2:

Because salary is part of the position appointment, it is not legally possible to make a retroactive promotion without an award of backpay.

Note 3: If an agency agrees to limit its right to exercise discretion on a matter that is discretionary within the agency, such as certain aspects of promotion policy, the agency is bound by the non-discretionary policy expressed in the negotiated agreement, as long as the policy does not conflict with law, Executive order, or appropriate regulation.

Note 4: The Comptroller General has held in recent decisions that a violation of a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, etc.

Note 5: An unwarrranted or unjustified personnel action may involve acts of omission as well as commission. Therefore, the failure to promote an employee or the failure to provide overtime work to specified employees in violation of a provision in a negotiated agreement--an act of omission--is remediable under the Back Pay Act.

Note 6: Occasionally organizational or other changes occur between the date of the unwarranted personnel action and the date when corrective action may be taken, which influence the remedy that can be given. For example, a situation may arise in which the agency abolished the position in question (perhaps due to a reorganization of the agency) before the arbitration award. To avoid having the award ruled too indefinite to permit implementation, the evidence should consider the grievant's entitlements "but for" the unjustified or unwarranted personnel action and whether the grievant would have been demoted from the position. If the evidence indicates that the grievant would

have been demoted, a termination date of the award setting a definite date of demotion should be established.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970).

References: 53 Comp. Gen. 1054 (1974); 54 Comp. Gen. 263 (1974); 54 Comp. Gen. 312 (1974); 54 Comp. Gen. 403 (1974); 54 Comp. Gen. 435 (1974); 54 Comp. Gen. 538 (1974); 54 Comp. Gen. 888 (1975): B-181173, November 13, 1974; B-181238, November 15, 1974; B-183061, July 2, 1975; B-183969, July 2, 1975; B-183985, July 2, 1975; B-180010, November 4, 1975; and B-183125, November 14, 1975.

CHAPTER 4

LEAVE

LOSS OF ANNUAL LEAVE DUE TO AN UNWARRANTED OR UNJUSTIFIED PERSONNEL ACTION

Type of case: An employee (1) is forced to take annual leave or (2) loses leave under circumstances not covered by 5 U.S.C. 6304(d).

Determination: The involuntary enforcement, loss, or denial of annual leave (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the grievant's pay, allowances, or differentials (i.e., leave). (See "Interpretations," app. IX.)

Available remedy: Recredit annual leave to employee's leave account.

Effective date of remedy: The effective date of the unjustified or unwarranted personnel action.

Note 1: Annual leave should be recredited in accordance with 5 U.S.C. 5596(B)(2) and CSC implementing regulations. The special leave benefits contained in 5 U.S.C. 6304(d) do not apply to backpay situations which are covered by the backpay statutory provisions. (See "Restoration of Annual Leave," app. IV.)

Note 2: The Comptroller General has consistently ruled that the discretion of agency heads under statute and law is sufficiently broad to enable them to deny employees annual leave during one period of time and instruct them to take annual leave at other specific times to satisfy the needs of the Federal service. (References: 31 Comp. Gen. 581,

586 (1952); 32 Comp. Gen. 204 (1952); and 40 Comp. Gen. 312, 314 (1960).

Note 3: If the agency, however, bargains away its rights to exercise discretion on a matter that is normally discretionary within the agency, such as taking annual leave, the agency is bound by the nondiscretionary policy expressed in the negotiated agreement as long as the policy does not conflict with law, Executive order, or appropriate regulation.

Note 4: The Comptroller General has held in more recent decisions that a violation of a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances, or differentials, such as annual leave, is as much an unjustified or unwarranted personnel action as is an improper suspension, and thus is remediable through the Back Pay Act.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970), and Federal Personnel Manual Letter 630-22, January 11, 1974.

Reference: 54 Comp. Gen. 503 (1974).

LOSS OF ANNUAL LEAVE NOT DUE TO AN UNWARRANTED OR UNJUSTIFIED PERSONNEL ACTION

Type of case: An employee who has planned in advance to take annual leave which would be forfeited if not taken, since it is in excess of the maximum leave permitted by law, is prevented from taking it through no fault of the employee.

Determination: The employee was prevented from taking leave because of (1) the exigencies of public business, (2) sickness of the employee, (3) administrative error, or (4)

violation of established agency policy or the negotiated agreement. ("Restoration of Annual Leave," app. IV.)

Available remedy:	Restore annual leave. Credit that leave which is in excess of the maximum leave accumulation permitted by law to a separate leave account that will be available to the employee within the 2-year time limit prescribed by CSC regulations.
Effective date of remedy:	Effective upon restoration of the leave.
Note:	Personnel actions determined unwarranted or unjustified because they violate established agency policy or agreement are not considered administrative errors under 5 U.S.C. 6304(d), which authorizes recrediting annual leave when determination (1), (2), or (3) above has been made. Therefore, when it has been determined that an unjustified or unwarranted personnel action has occurred , the affected employee's leave must be recredited under authrity of the Back Pay Act, 5 U.S.C. 5596, as amended (1975).
Authority:	Public Law 93-181, 5 U.S.C. 6304(d) (supp. III, 1973), and Federal Personnel Manual Letter 630-22, January 11, 1974.
References:	B-182229, November 7, 1974: B-184002, February 19, 1976, 55 Comp. Gen. 784.

DENIAL OF ANNUAL LEAVE FOR PERIOD OF ABSENCE

Type of case:	An employee is denied annual leave and is placed in an absence without leave (AWOL) status for the period of absence.
Determination:	The denial of annual leave (1) is an unwarranted or unjustified personnel action and (2) directly results in the

	withdrawal or reduction of the grievant's pay, allowances, or differentials. (See "Interpretations," app. IX.)
Available remedy:	Require backpay for the entire period while in AWOL status and correspondingly reduce the grievant's annual leave account.
Effective date of remedy:	The effective date of the AWOL action.
Note 1:	If the grievant had been placed in a sick leave status on the basis of competent medical evidence rather than AWOL status in the above situation, the appropriate remedy would be a recreditation of sick leave used with a corresponding reduction in the annual leave account. Backpay would not be an appropriate remedy since the employee suffered no loss of pay.
Note 2:	The Comptroller General has long held that the charging of leave is primarily a discretionary matter for the administrative office of the agency concerned. However, an agency may bargain away its discretion or promulgate a mandatory regulation regarding the employee's right to use leave. (Reference: 39 Comp. Gen. 250, 251 (1959).)
Note 3:	If the denial of annual leave and the enforcement of AWOL violates a nondiscretionary requirement found in a law, regulation, Executive order, agency personnel policy manual, or negotiated agreement, it may be determined to be an unwarranted or unjustified personnel action and thus be remediable through the Back Pay Act.
Authority:	Back Pay Act of 1966, 5 U.S.C. 5596 (1970).

Reference: B-180010.02, June 25, 1976, 55 Comp. Gen ______.

DENIAL OF SICK LEAVE FOR PERIOD OF ABSENCE

Type of case: An employee is denied sick leave and is placed in a leave without pay (LWOP) status or an annual leave status for the period of absence.

Determination: The denial of sick leave (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the grievant's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Require backpay for the entire period with a corresponding reduction in the grievant's sick leave account if in LWOP status; or, if applicable, recredit annual leave used with a corresponding reduction in sick leave account if in annual leave status.

Effective date of remedy: The effective date of the LWOP action.

Note 1: The Comptroller General has long held that the charging of leave and the granting or rejecting of advanced sick leave is primarily a discretionary matter for the administrative office of the agency concerned. (References: 39 Comp. Gen. 250, 251 (1959); B-164825, September 17, 1968; and B-182085, December 24, 1974.)

Note 2: If the agency's denial of sick leave violates a nondiscretionary requirement found in a law, regulation, Executive order, appropriate personnel policy manual, or negotiated agreement, it may be determined to be an unwarranted or unjustified personnel action and thus be remediable through the Back Pay Act.

Note 3: In cases where sick leave is denied in violation of a negotiated agreement but the agreement does not adopt the same definition of sick leave as CSC regulations, the CSC definition prevails. Since section 12(a) of Executive Order 11491, as amended, provides that any negotiated agreement is subject to the provisions of existing or future laws and regulations, sick leave is appropriate only when circumstances specifically and literally meet the criteria contained in 5 C.F.R. 630.401.

Authority: Back Pay Act of 1966, 5 U.S.C 5596 (1970).

References: B-181686, September 2, 1975, 55 Comp. Gen. 183; and B-171947.78, July 8, 1976, 55 Comp. Gen_____.

CHAPTER 5

OVERTIME COMPENSATION

DENIAL OF OPPORTUNITY TO WORK OVERTIME

Type of case: The opportunity for overtime work is not afforded an employee in violation of the negotiated agreement.

Determination: The grievant would have been afforded overtime work "but for" the agency's violation of the negotiated agreement, and this denial (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the grievant's pay, allowances, or differentials. ("Interpretations," app. IX.)

Available remedy: Require retroactive payment of overtime pay for periods when a specific employee would have performed overtime work "but for" the violation of the negotiated agreement.

Effective date of remedy: The effective date of the agency's violation of the negotiated agreement.

Note 1: If an agency bargains away its right to exercise discretion on a matter that is normally discretionary within the agency, such as overtime policy, the agency is bound by the nondiscretionary policy expressed in the negotiated agreement, as long as the policy does not conflict with law, Executive order, or appropriate regulation.

Note 2: The Comptroller General has held in recent decisions that a violation of a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances, or differentials is as much an unjustified or

unwarranted personnel action as is an improper suspension or furlough without pay.

Note 3: An unwarranted or unjustified personnel action may involve acts of omission as well as commission. Therefore, an employee deprived of overtime work in violation of a negotiated agreement--an act of omission--may be awarded backpay under the provisions of the Back Pay Act for the overtime lost.

Note 4: Backpay is not appropriate if a specific employee cannot be identified as having suffered a loss of pay as a result of the denial of opportunity to work overtime.

Note 5: The Comptroller General's "no work, no pay" rule is no longer in effect. (See "No Work, No Pay Rule," app. VI.)

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970).

References: 54 Comp. Gen. 1071 (1975); B-180010, August 25, 1975, 55 Comp. Gen. 171; and B-180010, October 29, 1975, 55 Comp. Gen. 405.

CHANGE IN BASIC WORKWEEK

Type of case: The basic workweek is unilaterally changed by the agency to avoid the payment of overtime compensation in violation of established agency policy or the negotiated agreement.

Determination: The grievant would have performed overtime work "but for" the change in the workweek (see note 1) and this change (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the grievant's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Require payment of backpay for periods when overtime work would have been performed "but for" the change in the workweek.

Effective date of remedy: All periods of overtime that the employee would have worked after the effective date of change in the basic workweek.

Note 1: There must be a direct causal relationship between the agency's change of the workweek and a loss or reduction in the grievant's pay.

Note 2: For general requirements regarding the basic workweek of Federal employees, see 5 U.S.C. 6101 (app. V). Exception: Under 5 U.S.C. 6101(a) (3) the basic workweek may be scheduled during a period other than Monday through Friday or changed without advance notice if the agency head determines (1) the agency's functions would be seriously handicapped or (2) its costs would be substantially increased by following the usual workweek sequence. To the extent that this exception is applicable, backpay for overtime compensation is not available.

Note 3: In fashioning a remedy, 5 U.S.C. 6302 (a) prohibits a grievant from being placed in an annual leave status for a period during which the grievant was not scheduled to work so as to entitle the grievant to overtime compensation for that day.

Note 4: Backpay is not appropriate if a specific employee cannot be identified as having suffered a loss of pay as a result of the workweek change.

Note 5: An agency's failure to consult with the union, as provided in the negotiated agreement, before initiating a change

in the workweek does not, in itself, result in the necessary "but for" relationship between the wrongful act and the harm to the grievant. (See "Failure-to-Consult," app. VII.)

Note 6: The Comptroller General's "no work, no pay" rule is no longer in effect. (See "No Work, No Pay Rule," app. VI.)

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970), and 5 U.S.C. 6101 (1970).

References: 54 Comp. Gen. 1071 (1975); B-180010, August 25, 1975, 55 Comp. Gen. 171; B-180010, January 6, 1976, 55 Comp. Gen. 629; and B-171947.78 July 9, 1976, 55 Comp. Gen._____.

WORK ACTUALLY PERFORMED

Type of case: An employee is denied overtime compensation for work actually performed in excess of the employee's regular workweek or outside the regular duty hours.

Determination: The appropriately authorized official has authorized, approved, or induced the performance of overtime work and, thus, the denial of overtime compensation (1) is an unjustified or unwarranted personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Require payment of backpay for periods when overtime work was actually performed if consistent with notes 1 and 5 below.

Effective date of remedy: The periods when overtime work was actually done.

Note 1: Under 5 U.S.C. 5542(2), hours of work officially ordered or approved in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day and performed by an employee are overtime work and shall be compensable. The implementing regulations are found in 5 C.F.R. 550.111.

Note 2: Payment of overtime compensation is contingent on whether the overtime work was authorized, approved, or induced by an official having delegated authority.

Note 3: The Comptroller General, relying on Baylor v. United States, 198 Ct. Cl. 331 (1972), held that inducement of overtime work may be found if the appropriately authorized official knew of or should have known of procedures which would require the grievant to work overtime.

Note 4: If an appropriately authorized official did not authorize, approve, or induce overtime work, it is not compensable except under the Fair Labor Standards Act (FLSA). (See note 5.)

Note 5: Under FLSA an employee covered by the act shall receive compensation if suffered or permitted to work. The employee need not have been authorized, approved, or induced to work, only that the supervisor had reason to believe the work was being done. The CSC holds that the FLSA complaint procedure is a statutory appeals procedure and that complaints over the act must be adjudicated under Federal Personnel Manual Letter 551-9.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970); 5 U.S.C. 5542; and 5 C.F.R. 550.111.

References: B-180139, October 8, 1974, and B-175363, November 26, 1974.

WORK PERFORMED WHILE IN TRAVEL STATUS

Type of case: Overtime compensation is denied an employee for work performed while in a travel status incident to performing temporary duty.

Determination: The agency had officially ordered or approved the overtime work before travel and/or the overtime work was work which could only be performed while traveling. Thus, the denial (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the grievant's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Require payment of backpay for period when overtime work was actually performed while in a travel status.

Effective date of remedy: The beginning of the period when the employee was in a travel status.

Note 1: According to the provisions of 5 U.S.C. 5542(b)(2)(B)(i) (1970), if the record fails to show that the agency officially ordered or approved the overtime work or that the work was work which could only be performed while traveling, no basis exists for considering the travel as having included the performance of work. Under title 5, for such time spent traveling to be counted as hours of work, the travel must either (1) involve the performance of work while traveling, (2) be incident to travel that involved the performance of work while traveling, (3) be carried out under arduous conditions, or (4) result from an event which could not be scheduled or controlled administratively.

Note 2: FLSA provides different criteria for determining whether travel time should be considered hours of work for those employees covered by the act. Authorized travel time outside regular working hours is "hours of work" and compensable under FLSA if an employee (1) performs work while traveling (including travel as a driver of a vehicle), (2) travels as a passenger to a temporary duty station and returns during the same day, or (3) travels as a passenger on nonwork days during hours which correspond to one's regular working hours. CSC holds that the FLSA complaint procedure is a statutory appeals procedure and that complaints under the act must be adjudicated under Federal Personnel Manual Letter 551-9.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970); 5 U.S.C. 5542(b)(2)(B)(i) (1970); Federal Personnel Manual, Supp. 990-2, Book 550, S1-3b(2)(c)(iv) (July 1969); and Federal Personnel Manual Letter 551-10.

References: B-181843, November 19, 1974; B-146288, January 3, 1975; and B-179186, April 13, 1976.

TRAVEL PERFORMED ON WEEKEND

Type of case: Overtime compensation is denied to an employee for travel incurred on a weekend incident to performing temporary duty on a weekday away from the employee's official duty station.

Determination: The travel resulted from an event which could not be scheduled or controlled administratively and thus the denial (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the grievant's pay,

allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Require backpay for overtime compensation during period when traveling on the weekend.

Effective date of remedy: The beginning of the period when weekend travel was performed.

Note 1: The phrase "could not be scheduled or controlled administratively" refers to the ability of an executive agency (as defined in 5 U.S.C. 105) and the District of Columbia government to control the event which necessitates an employee's travel. The control is assumed to be the agency's, whether the agency has sole control or the control is achieved through a group of agencies acting in concert.

Note 2: Weekend travel will be considered "hours of work" and thus entitled to overtime compensation when it results from unforeseen circumstances (e.g., a breakdown of equipment) or from an event which is scheduled or controlled by someone or some organization <u>outside of Government</u>.

Note 3: FLSA provides different criteria for determining whether travel time should be considered hours of work for those employees covered by the act. Authorized travel time outside regular working hours is "hours of work" and compensable under FLSA if an employee (1) does work while traveling (including travel as a driver of a vehicle), (2) travels as a passenger to a temporary duty station and returns during the same day, or (3) travels as a passenger on nonworkdays during hours which correspond to one's regular working hours. CSC holds that the FLSA complaint procedure is a

statutory appeals procedure and that complaints under the act must be adjudicated under Federal Personnel Manual Letter 551-9.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970); 5 U.S.C. 5542(b)(2)(B)(iv) (1970); Federal Personnel Manual, Supp. 990-2, Book 550, S1-3b(c)(iv) (July 1969); and Federal Personnel Manual Letter 551-10.

References: B-163654, April 19, 1968; B-179430, November 25, 1974; and B-146288, January 3, 1975.

COMPENSATORY TIME VERSUS OCCASIONAL OVERTIME COMPENSATION

Type of case: An employee who performs occasional or irregular overtime work is given compensatory time off in lieu of overtime compensation which the employee requested.

Determination: The employee's basic rate of pay is less than or equal to the maximum GS-10 rate and is exempt from the overtime provisions of the FSLA Amendments of 1974. Thus, the denial of overtime compensation (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Payment of backpay for the period when overtime work was performed. Backpay is equal to the difference between the overtime compensation that should have been received and the value of the compensatory time actually used. In such cases, compensatory time is given on a "1-for-1" basis. That is, an employee receives 1 hour of compensatory time for every hour of work done during an overtime period.

Effective date of remedy: The period when overtime work was done.

Note 1: Under 5 U.S.C. 5543(a)(2) the agency is authorized to grant compensatory time off in lieu of overtime compensation for <u>occasional</u> or <u>irregular</u> overtime work if the employee's basic rate of pay exceeds the maximum GS-10 rate. The implementing regulations are found in 5 C.F.R. 550.114. However, if the employee's basic rate of pay exceeds the minimum rate of GS-10, the hourly overtime rate is equal to 1-1/2 times the hourly rate at the minimum rate of GS-10.

Note 2: The Comptroller General has held that irregular overtime work is work that does not recur on successive days or after specified intervals and the word "occasional" is to be given its common dictionary definition, namely "occurring now and then; occurring at irregular intervals; infrequent."

Note 3: Under 5 C.F.R. 550.114(c) the agency is authorized to fix a time limit for taking compensatory time off. The employee loses the right to this benefit after the expiration limit unless the failure is due to an exigency of the service beyond the employee's control.

Note 4: Compensatory time off for overtime work is not appropriate for employees subject to the provisions of the FLSA Amendments of 1974 if the employee overtime entitlement is greater under FLSA than under title 5. FLSA requires that the employee be paid for the overtime work. CSC holds that the FLSA complaint procedure is a statutory appeals procedure and that complaints under the act must be adjudicated under Federal Personnel Manual Letter 551-9. To the extent that a nonexempt

employee earns entitlement to overtime compensation under FLSA, the provisions of FLSA will be applicable rather than 5 U.S.C. 5542 and 5543.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970); 5 U.S.C. 5542; and 5 U.S.C. 5543.

References: B-181211, November 6, 1974, and B-181822, January 3, 1975.

CHAPTER 6

RESIGNATION OR VOLUNTARY REDUCTION IN RANK

Type of case: An employee voluntarily requests a reduction in rank to avoid a more serious personnel action (e.g., reduction in force), or voluntarily resigns due to adverse conditions within the agency.

Determination: The employee's action was voluntary in nature and was not the result of threats, coercion, or intolerable working conditions. This determination must be made by an appropriate authority pursuant to the employee's appeal from an adverse action.

Available remedy: None.

Effective date of remedy: None.

Note 1: If the employee's action was voluntary, there was no unwarranted or unjustified personnel action within the meaning of the Back Pay Act, 5 U.S.C. 5596 (1970) and, therefore, the employee is not entitled to backpay.

Note 2: The Comptroller General has held that in certain cases an employee who voluntarily resigns may be considered constructively discharged if the agency circumvented statutory procedures by subjecting the employee to threats, coercion, or intolerable working conditions. In such cases, the employee would be alleging that an adverse action had been taken against him/her without benefit of proper procedures. The determination would have to be made by an appropriate authority, such as the Federal Employee Appeals Authority, under applicable statutory appeals procedures.

Authority:	Back Pay Act of 1966, U.S.C. 5596 (1970).
Reference:	B-181614, February 5, 1975.

CHAPTER 7

EQUAL EMPLOYMENT OPPORTUNITY VIOLATIONS

Type of case: An employee or an applicant for employment is denied an employment benefit or an adverse administrative decision is made against the employee.

Determination: The agency action was based on discrimination in violation of the Equal Employment Opportunity Act of March 24, 1972, Public Law 92-261, codified at 42 U.S.C. 2000e-16(a) (supp. IV, 1974).

Available remedies: Statutory appeal procedures are available, as provided in 5 C.F.R. 713, to remedy discriminatory actions against Federal employees and applicants for employment.

Promotions

1. Require retroactive appointment of the applicant or retroactive promotion with backpay computed in the same manner as 5 C.F.R. 550.804 when the record clearly shows "but for" the discrimination, the employee would have been promoted or the applicant hired.

Note: The period of retroactivity for which backpay is permitted may not be more than 2 years before the date the equal employment opportunity complaint was filed and may not exceed the date the grievant would have been promoted or appointed.

2. Require consideration for appointment or promotion to a position for which the grievant is qualified before considering other candidates when the record shows that

discrimination existed at the time selection for the appointment or promotion was made, but it is not clear that except for the discrimination, the grievant would have been appointed or promoted.

Note: This priority consideration takes precedence over priorities under other regulations of 5 C.F.R. 713.

Adverse administrative decisions

Require the cancellation of the adverse decision with the employee's restoration, if applicable, and, if the decision involves an unwarranted disciplinary action that is not a personnel action, such as a reprimand, expunction from the agency's records of any reference to the action.

Denial of employee benefit

Require full opportunity to participate in the benefit denied grievant.

Note 1: Although backpay under the Equal Employment Opportunity Act is computed in the same manner as backpay under the Back Pay Act of 1966, the period of retroactivity differs. Backpay may not extend back more than 2 years under the Equal Employment Opportunity Act, while there is a 6-year limitation on backpay for unjustified or unwarranted personnel actions under the Back Pay Act.

Authority: Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16(a)(supp. IV, 1974).

References: Johnson v. U.S. Postal Service, 364 F. Supp. 37 (D.C. Fla. 1973) affirmed 497 F.2d 128; Sperling v. U.S.,

515 F.2d 465, (3rd Ci. 1975); and
<u>Levens</u> v. <u>General Services Adminis-
tration</u>, 391 F. Supp. 35 (D.C. Mo.
1975).

CHAPTER 8

WORK ASSIGNMENT

JOB APPOINTMENT

Type of case:	An employee is initially appointed to a lower grade than the grade required by nondiscretionary agency policy.
Determination:	The appointment to the lower grade (1) is an unjustified or unwarranted personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)
Available remedy:	Retroactive change in appointment together with backpay. (See "Back Pay Act," app. I.)
Effective date of remedy:	The effective date of the initial appointment to the incorrect grade.
Authority:	Back Pay Act of 1966, 5 U.S.C. 5596 (1970).
Reference:	B-181223, July 29, 1974.

WORK FUNCTION

Type of case:	There is a variance between an employee's appointed position and the duties actually performed.
Determination:	The employee is doing work of a higher grade level than the position to which appointed. This is a classification determination that must be made under the appropriate classification appeal procedure.
Available remedies:	The agency may, on its own volition, assign the employee lower level work commensurate with grade level. The employee may seek reclassification

	through the statutory appeals procedure provided by 5 C.F.R. 511 or 5 C.F.R. 532, as applicable.
Effective date of remedies:	The date the appropriate authority directs; it is prospective only (5 C.F.R. 511.701 et seq.).
Note 1:	The longstanding rule, established in both Comptroller General and judicial decisions, is that an employee is entitled only to the appointed position salary regardless of the duties actually performed. The employee is not entitled to the salary of a higher level position unless and until the position is reclassified to the higher grade by either the agency or CSC and the employee is promoted to it. (Reference: B-180056, May 28, 1974, and _U.S._ v. _Testan_, 424 U.S. 392 (1976).)
Note 2:	Position Classification (grade series and title) is a matter of administrative discretion which rests solely with the agency involved and CSC.
Authority:	5 C.F.R. Part 511
References:	B-183218, March 31, 1975, and B-182695, September 15, 1975.

TEMPORARY EXTENDED DETAIL TO HIGHER GRADE

Type of case:	An employee is detailed to a higher grade position in excess of 120 days and, contrary to CSC regulations, neither is the employee given a temporary promotion nor is the extension of the detail for an additional 120 days submitted to CSC for approval.

Determination:	The failure of the agency either to seek prior approval of the extension or to grant a temporary promotion (1) is an unjustified or unwarranted personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)
Available remedy:	Require retroactive temporary promotion with backpay. (See "Back Pay Act," app. I.)
Effective date of remedy:	121 days after the effective date of the employee's detail to the higher grade.
Note 1:	According to the Federal Personnel Manual, Ch. 300, Subch. 8, Sec. 8-4f, an agency <u>must</u> seek prior CSC approval when a detail to a higher grade is expected to exceed 120 days.
Note 2:	The Appeals Review Board, CSC, formerly the Board of Appeals and Review, with the concurrence of the Comptroller General, has interpreted Chapter 300 of the Federal Personnel Manual to mean that an agency's discretionary authority to retain an employee on detail to a higher grade position continues no longer than 120 days. The agency must either seek prior approval from CSC for an extension or temporarily promote the employee at the end of the time period. If the agency fails to seek prior approval from CSC for the extension, the agency has a mandatory duty to award the employee a temporary promotion if the employee continues to perform at the higher grade.
Note 3:	The Whitten Amendment requires that a classified employee of GS-5 or above serve 1 year in the next lower grade before being eligible for either a

temporary or permanent promotion. To the extent this requirement has not been fulfilled, a grievant may not be retroactively promoted.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970), and Federal Personnel Manual, Ch. 300, Subch. 8.

References: 54 Comp. Gen. 263 (1974); B-181173, November 13, 1974; B-183086, December 5, 1975, 55 Comp. Gen. 539; and B-184990, February 20, 1976, 55 Comp. Gen. 785.

CHAPTER 9

PAY

RATE OF PAY

Type of case: An employee's rate of pay is set at a lower grade or step than required by applicable regulations or nondiscretionary agency policy, such as the agency violating its policy regarding the highest previous rate rule.

Determination: The incorrect rate (1) is an unjustified or unwarranted personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Adjust pay rate retroactively to the appropriate rate required by regulations or agency policy with backpay. (See "Back Pay Act," app. I.)

Effective date of remedy: The date the incorrect pay rate became effective.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970).

References: 51 Comp. Gen. 656 (1972); B-181223, July 29, 1974; and B-180997, October 30, 1974.

ENVIRONMENTAL PAY

Type of case: An environmental pay differential is denied (1) to a wage system (WG) employee who is exposed to unusually severe hazards, physical hardships, or working conditions, as provided in the Federal Personnel Manual Supplement 532-1, Appendix J, or (2) to a GS employee who performs irregular or intermittent duty involving unusual physical

hardship or hazard as provided in the Federal Personnel Manual Supp. 990-2, Appendix A.

Determination: The employee is actually exposed to a hazardous condition or a physical hardship which agency action has not overcome. Its payment is authorized under the Federal Personnel Manual Supplement 532-1 or 990-2, as applicable; and the denial of the environmental pay differential (1) is an unjustified or unwarranted personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Require backpay of environmental pay differential for the entire period the employee worked under hazardous or environmental conditions. (See "Back Pay Act," app. I.)

Effective date of remedy: The dates that the employee was exposed to the hazardous or environmental conditions.

Note 1: Environmental pay is not limited to hazardous working conditions, but also includes unusually severe physical hardships and working conditions, such as dirty work, cold work, and hot work.

Note 2: Hazard pay differential may be paid to a GS employee only for irregular or intermittent duty specified in Appendix A of the Federal Personnel Manual Supplement 990-2 when that duty is not usually involved in carrying out the duties of the position. The differential may not be paid to a GS employee when the hazardous duty has been taken into account in classifying the position.

Note 3: GS employees are paid the applicable percentage based on their actual salary: WG employees are paid based on the second step of a WG-10.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970): 5 U.S.C. 5343(c)(4)(1970); Federal Personnel Manual Supp. 532-1, Subch. S8-7 and App. J; 5 U.S.C. 5545(d); and Federal Personnel Manual Supp. 990-2, Book 550, Subch. S9, App. A.

References: 53 Comp. Gen. 789 (1974); B-180109, January 2, 1976; and B-180010.03, October 7, 1976, 56 Comp. Gen. ______.

PERIODIC STEP INCREASE
(See note.)

Type of case: An employee is improperly denied a periodic step increase, or the increase is delayed.

Determination: The improper delay or denial (1) is an unjustified or unwarranted personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Require retroactive step increase with backpay. (See "Back Pay Act," app. I.)

Effective date of remedy: The date the step increase would have been effective if the unwarranted or unjustified action had not occurred.

Note: This type of case is subject to a statutory appeals procedure pursuant to 5 C.F.R. 531.407 and is thus precluded from the coverage and scope of a negotiated grievance procedure under section 13(a) of Executive Order 11491, as amended.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970).

References: 37 Comp. Gen. 300 (1957); 37 Comp. Gen. 774 (1958); and B-173976(.10), July 11, 1972.

DUES WITHHOLDING

Type of case: An agency improperly deducts union dues from an employee who has left the bargaining unit contrary to 5 C.F.R. 550.322(c).

Determination: The deduction (1) is an unwarranted or unjustified personnel action and (2) directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials. (See "Interpretations," app. IX.)

Available remedy: Require backpay in the amount of dues improperly deducted after the employee left the bargaining unit.

Effective date of remedy: The effective date the employee left the bargaining unit.

Note 1: If the improper deduction of dues has resulted in an overpayment of dues checkoff to the union, the Government is entitled to recoup from the union an amount equal to the overpayment by reducing a current payment of the dues checkoff by the specified amount. This is based on the principle that payment of Federal funds is limited solely for the purpose of appropriations. (Reference: 54 Comp. Gen. 921 (1975).) (This case is currently before the Court of Claims for enforcement of an arbitration award.)

Note 2: It is also a basic principle of law and commerce that a payee is not entitled to be paid by a payor more money than is due. Thus, at an

earlier time if a payee is paid more on an obligation than is due, the payor may rightfully adjust subsequent payments to compensate for such overpayments, so that the payee may not be unjustly enriched.

Authority: Back Pay Act of 1966, 5 U.S.C. 5596 (1970), and 31 U.S.C. 628 (1970).

References: B-180095, October 1, 1974, and 54 Comp. Gen. 921 (1975).

CHAPTER 10

MISCELLANEOUS CASES

JURY DUTY

Under 5 U.S.C. 6322(a), the longstanding policy of the Congress permits Government employees to perform jury duty without loss of compensation or leave. Accordingly, the Comptroller General has held that:

1. An employee is entitled to compensation for regularly scheduled working hours, although not scheduled for actual jury duty, when it would impose a hardship to return to regular work at the time the employee is excused from jury duty. (26 Comp. Gen. 413 (1946).)

2. An employee may be excused from regularly scheduled night duties without charge to annual leave and with compensation at the night differential rate when performing jury duty during the day. (29 Comp. Gen. 427 (1950).)

3. An employee may be excused from regularly scheduled weekend duty without charge to annual leave and with compensation at the weekend differential rate (premium pay) otherwise payable when performing jury duty from Monday through Friday. (54 Comp. Gen. 147 (1974).)

4. Computation of jury service fee payable to Federal Government employees whose period of jury service in Federal courts overlaps in part their normal workday shall be based on a jury service fee of $20 prorated over a standard 8-hour workday, that is, $2.50 for each hour of jury service beyond the hours employees worked or would have worked "but for" jury service.

   In computing excess hours of jury service in Federal court over number of employee's working hours in a day, fractional hours shall be rounded off, a half hour or more equaling 1 hour. When the end of an employee's scheduled workday coincides with the beginning of Federal jury service, it is not necessary to prorate the jury fee. Any travel time

between duty stations and the court is to be considered as court leave. (B-70371, July 13, 1976, 55 Comp. Gen. ______.)

5. The principle of permitting pro-rata payment of jury fees to employees for jury service in Federal courts extending beyond scheduled workday is equally applicable to jury duty performed in State courts. Employees may be permitted to retain a pro-rata portion of the fee for jury service in State or municipal courts extending beyond their scheduled workday. Contrary prior decisions are no longer controlling. (B-119969, July 13, 1976, 55 Comp. Gen. ______.)

Note: Jury fees covering weekdays which the employee does not usually work should be credited against the employee's pay for the substituted days of court leave on weekends.

STANDBY DUTY

Under 5 U.S.C. 5545(c)(1) an employee is required to receive premium pay for standby duty when regularly required to remain <u>at or within the confines of his duty station</u> during longer than ordinary periods of duty to perform standby duty.

According to 5 C.F.R. 550.143(b), the phrase "at or within the confines of his station" means:

1. At an employee's regular duty station.

2. In quarters provided by an agency which are not the employee's ordinary living quarters and are specifically used for standby duty.

3. In an employee's living quarters, when designated by the agency as the duty station and when the employee's whereabouts are narrowly limited and activities are substantially restricted.

The Comptroller General has consistently held that employees who are required to perform standby duty and either (1) are not restricted to their residences or (2) are restricted to their residences but are free to perform whatever activities they desire are not entitled to premium pay, overtime compensation, etc., by virtue of being on call.

Such duty does not constitute "hours of work," nor does it satisfy the requirement of 5 C.F.R. 550.143(b)(3).

References: B-173783.116, April 1, 1975, and B-176924, September 20, 1976.

PROVISIONS OF BACK PAY ACT OF 1966, 5 U.S.C. 5596 (1970)

1. Coverage--5 C.F.R. 550.802(a)

Applies to employees and former employees of:

--An executive agency (other than the Tennessee Valley Authority) as defined in 5 U.S.C. 105 (i.e., executive departments, independent agencies, GAO).

--The Library of Congress.

--The Government Printing Office.

--The District of Columbia government.

--The Administrative Office of the United States Courts.

2. General requirement

An employee or former employee is entitled to backpay when it is administratively determined by an appropriate authority (see "Interpretations," app. IX) that the grievable matter

--is a result of an unwarranted or unjustified personnel action and

--directly results in the withdrawal or reduction of the employee's pay, allowances, or differentials.

3. Specific requirement--"but for" relationship

A direct causal relationship must be established between the unjustified or unwarranted personnel action and the loss of pay, allowances, or differentials. Remedies under the Back Pay Act are not available unless it is established that "but for" the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred.

4. Entitlement

An employee who meets the requirements of the Back Pay Act:

--Is entitled to receive, for the period the wrongful action was in effect, an amount equal to all or part of the employee's pay, allowances, or differentials and leave recreditation, as applicable, that normally would have been earned if the wrongful action had not occurred.

--Is deemed to have performed service for the agency during that period.

5. Inclusions in backpay computation

In recomputing backpay for the period covered by the corrective action, the following should be included:

--Premium pay.

--Changes in pay rates by reason of wage surveys, administrative action, law, or other changes of general application.

--Changes in allowance or differential rates.

--Within-grade or step increases which would otherwise have become due.

--Changes in pay caused by changes in assigned working shifts.

--Changes in employee's leave-earning rate.

--Any other changes which would affect the amount of pay, allowances, differentials, or leave which the employee would have earned had it not been for the action.

6. Exclusions and deduction in backpay computation

a. The period included in the recomputation may not extend beyond the date

--of the employee's death or

--on which the employee was properly separated from the agency's rolls if the separation would have been effected regardless of the wrongful act.

b. The recomputation may not include any period during which the employee:

--Was not ready and able to perform the job because of incapacitating illness, except that the employee may request any sick or annual leave to his/her credit to cover the period of incapacity.

--Was unavailable to perform the job, and this unavailability was not related to or caused by the wrongful action.

c. Any amounts the employee earned from other employment during the period covered by the corrected action (i.e., earned as a substitute for the employment which was incorrectly terminated or suspended) must be deducted. However, if the employee held a part-time job during the period covered by the corrected action that he/she would have held had the wrongful action not occurred, the employee is entitled to the full amount of pay for the period. (See "Interpretations," app. IX.

d. Any amounts which represent reimbursement for expenses which the employee would have incurred in performance of the job, but which were not incurred due to the unjustified or unwarranted action, may not be included as allowances.

7. <u>Special considerations in backpay computation</u>

a. Annual leave lost due to an unwarranted or unjustified personnel action may not be recredited to an employee's regular leave account in an amount that would cause the employee's leave balance to exceed the maximum amount authorized by law or regulation. Excess leave should be recredited to a special account pursuant to 5 U.S.C. 5596(b)(2).

Note: The provisions of Public Law 93-181 (codified at 5 U.S.C. 6304(d)) regarding annual leave recreditation do not apply to backpay remedies which are included under 5 U.S.C. 5596 (b)(2) (supp. V, 1975). (See "Restoration of Annual Leave," app. IV.)

b. If the employee is restored within 1 year after the erroneous separation, no period of time may be deleted from the backpay computation on the basis

that the employee was under obligation to make an effort to secure employment during the period covered by the separation. However, under certain circumstances when the employee is separated for more than 1 year before restoration, the agency has authority to reduce the amount of the employee's backpay because the employee failed to satisfy the obligation to make an effort to secure employment during the separation (5 C.F.R. 550.804(F)).

REMEDIES NOT AVAILABLE UNDER BACK PAY ACT

OF 1966, 5 U.S.C. 5596 (1970)

1. Interest on backpay

The payment of interest on backpay is not provided for under 5 U.S.C. 5596 (1970).

General rule: In the absence of a statute authorizing the payment of interest, interest does not accrue upon claims against the Government.

References: *Seaboard Air Line Railway v. United States*, 261 U.S. 299, 304 (1923); *Smyth v. United States*, 302 U.S. 329, 353 (1937); 45 Comp. Gen. 169 (1965); and B-180021, March 20, 1975.

2. Payment of consequential damages

Recompensation is authorized under 5 U.S.C. 5596 (1970) for only a limited class of actual damages resulting directly from the unjustified or unwarranted personnel action in the form of pay, allowances, or differentials.

Examples of consequential damages which are not recompensable include

--loss of equity in car or house through repossession or foreclosure actions,

--lost promotion or training opportunities, and

--loss of professional reputation or standing.

3. Payment of punitive damages

4. Recompensation for discrimination in hiring on non-equal-employment-opportunity grounds

The Back Pay Act of 1966, 5 U.S.C. 5596 (1970), provides a statutory remedy only for Federal employees who have been wrongfully deprived of pay, allowances, or differentials. It does not cover applicants for employment. However, see 5 C.F.R. 713.

5. Reimbursement to restored employee for commercial health insurance

Authority is provided under 5 U.S.C. 8908 (1970) to restore health insurance benefits to employees reinstated under the Back Pay Act. (See app. X.) However, neither 5 U.S.C. 8908 (1970) nor 5 U.S.C. 5596 (1970) authorizes reimbursement to restored employees for commercial health insurance purchased during periods when unjustified or unwarranted removals or suspensions were in effect.

6. Attorney fees and other litigation expenses

The payment of attorney fees or other litigation expenses is not provided for under 5 U.S.C. 5596 (1970).

General rule: In the absence of a statute expressing a contrary intention, attorney fees and litigation expenses incurred by a plaintiff, or which a plaintiff is obligated to pay, are not recoverable as an item of damages in a contract or a tort action. But see Fitzgerald v. U.S. Civil Service Commission, 407 F. Supp. 380 (1975), allowing attorney fees under 5 U.S.C. 7701.

References: Stewart v. Sonneborn, 98 U.S. 187 (1878); Hauenstein v. Lynham, 100 U.S. 483 (1880); Piggly Wiggly v. United States, 112 Ct. Cl. 391, 432 (1949); Edelman v. United States, 117 Ct. Cl. 400, 413 (1950); and 49 Comp. Gen. 44 (1969).

APPENDIX III

OTHER AVAILABLE REMEDIES

1. Health insurance--5 U.S.C. 8908 (1970)

Authority is provided under 5 U.S.C. 8908 (1970) to restore health insurance benefits to employees reinstated under the Back Pay Act who were improperly removed or suspended from Government employment as a result of unjustified or unwarranted personnel actions. An employee has the option either to

--have the prior enrollment reinstated retroactive to the date it was terminated with appropriate adjustments made in contributions and claims or

--enroll in the plan and option of choice, the same as a new employee.

Civil Service Commission regulations implementing 5 U.S.C. 8908 (1970) are contained in paragraph S8-5, Federal Personnel Manual Supplement 890-1, Instruction 34, September 24, 1973.

Note: An employee restored to duty after an erroneous removal or suspension should be notified of the options in health benefits coverage.

Reference: See text, appendix X.

2. Government life insurance--5 U.S.C. 8706(f) (supp. III, 1973)

Authority is provided under 5 U.S.C. 8706(f) to restore life insurance benefits to employees reinstated under the Back Pay Act who were improperly removed or suspended from Government employment as a result of unjustified or unwarwanted personnel actions. An employee is deemed to have been insured during the entire period of his erroneous separation or suspension.

Note: Effective on or after October 21, 1972, no life insurance deductions are to be withheld from any backpay adjustment for the period of suspension or separation unless death or accidental dismemberment of the employee occurs during that period (Paragraph S4-2e, Federal Personnel Manual Supplement 870-1, Instruction 14).

Reference: See partial text, appendix XI.

RESTORATION OF ANNUAL LEAVE

Under provisions of 5 U.S.C. 5596(b)(2), annual leave in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee who has undergone an unjustified or unwarranted personnel action that has caused annual leave loss.

Permitted under 5 U.S.C. 6304(d) (supp. III, 1973) is the restoration of annual leave that is lost to an employee through no fault of the employee because of

--administrative error, when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

--exigencies of public business, when the annual leave was scheduled in advance; or

--sickness of the employee, when the annual leave was scheduled in advance.

Under these circumstances, restored annual leave in excess of the maximum leave accumulation permitted by law may be credited to a separate leave account for the employee and may be available for use within the time limits prescribed by CSC regulations.

Exception: According to CSC implementing regulations in Federal Personnel Manual Letter 630-22, January 11, 1974, unwarranted or unjustified personnel actions covered under 5 U.S.C. 5596 (1970) are not considered to be administrative errors for the purposes of 5 U.S.C. 6304(d).

Note: Any leave restored under 5 U.S.C. 5596(b)(2) or 5 U.S.C. 6304(d) but unused and still available to the employee may be included in the lump-sum payment under 5 U.S.C. 5551 or 5552(1) but may not be retained to the credit of the employee under 5 U.S.C. 5552(2). The same principle applies to annual leave restored under 5 U.S.C. 5562(a).

Reference: See partial text, appendix XII.

5 U.S.C. 6101: GENERAL REQUIREMENTS

A basic workweek of 40 hours is prescribed for Federal employees under 5 U.S.C. 6101. It also requires that

--the workweek be scheduled in 8-hour segments, Monday through Friday, when possible;

--the working hours on each day be the same;

--employees be assigned to a particular tour of duty at least a week in advance; and

--the head of an agency issue regulations setting the hours that will constitute the workweek in that agency.

Exception: According to 5 U.S.C. 6101(a)(3) (1970), the basic workweek may be scheduled during a period other than Monday through Friday or changed without advance notice if the agency head determines (1) the agency's function would be seriously handicapped or (2) its costs would be substantially increased by following the usual workweek sequence.

NO WORK, NO PAY RULE

Before the issuance of 54 Comp. Gen. 1071 (1975), Comptroller General decisions had employed the "no work, no pay" rule in cases regarding overtime compensation. That is, since the authority for payment of overtime compensation contemplated the actual performance of duty during the overtime period, an employee who did not perform the overtime could not be entitled to overtime pay. The decisions held that the withdrawal or reduction in pay referred to in the Back Pay Act, 5 U.S.C. 5596 (1970), meant the actual withdrawal or reduction of pay or allowances which the employee had previously received or was entitled to.

In B-175867, June 19, 1972, the employee involved was deprived of the opportunity to work overtime because the agency failed to comply with a union agreement. The "no work, no pay" rule was applied, and the employee was denied recompensation since the improper action was one of omission and not considered an unjustified or unwarranted personnel action under 5 U.S.C 5596 (1970).

The Comptroller General has since reexamined his position that omission or failure to take action for an improper reason does not entitle the employee to backpay. He overruled his previous decisions and has since held that a violation of a mandatory provision in a labor-management agreement which causes an employee to lose pay, allowances, or differentials may be an unwarranted or unjustified personnel action.

He also has held that an unjustified personnel action may involve acts of omission as well as commission. Examples are failure to promote an employee in a timely fashion or failure to afford an opportunity for overtime work in accordance with requirements of agency regulations or collective bargaining agreements. Therefore, under the Back Pay Act, an agency may retroactively grant backpay to an employee who has undergone an unjustified or unwarranted personnel action, although such action was one of omission rather than one of commission.

FAILURE TO CONSULT AS PROVIDED

IN NEGOTIATED AGREEMENT

When an agency has agreed to consult with an exclusive bargaining representative on a particular matter and expressed that intention in the negotiated agreement but failed to fulfill its contractual obligation to do so, two determinations are necessary for backpay to be appropriate. It must be determined that the agency not only violated the agreement to consult, but also that such improper action directly caused the grievant to suffer a withdrawal of pay. That is, the denial of pay or benefits would not have occurred were it not for the violation of the agreement.

Unless the agreement requires the agency to carry out the consulting advice it receives, there is no causal relationship between the agency's failure to consult (an unwarranted or unjustified personnel action) and the employee's loss of pay, allowances, or benefits. For example, even if the agency had consulted with the union concerning hours-of-work changes, there is no reason to believe the agency would have modified a proposed change in the workweek schedules to allow the grievant overtime work. Since it cannot be shown that the agency's failure to consult would have resulted in overtime pay to the grievants, back pay is not an appropriate remedy.

TEXT OF BACK PAY ACT OF 1966, 5 U.S.C. 5596, AS AMENDED THROUGH JANUARY 1, 1977

"§ 5596. Back pay due to unjustified personnel action.

"(a) For the purpose of this section, 'agency' means--

"(1) an Executive agency;

"(2) the Administrative Office of the United States Courts;

"(3) the Library of Congress;

"(4) the Government Printing Office; and

"(5) the government of the District of Columbia.

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that--

"(A) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Civil Service Commission, and

"(B) annual leave credited under subparagraph (A) of this paragraph but unused and

APPENDIX VIII

still available to the employee under regulations prescribed by the Commission shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

"(C) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees."

As amended, Public Law 94-172, Section 1(a), December 23, 1975, 89 Stat. 1025.

(CSC regulations implementing this statute are found at 5 C.F.R., Part 550, Subpart H.)

INTERPRETATIONS OF BACK PAY ACT

OF 1966, 5 U.S.C. 5596 (1970)

1. "Appropriate authority" may mean an agency head, the decisionmaker designated pursuant to a statutory appeals procedure (e.g., the Federal Employee Appeals Authority), an administrative law judge, an arbitrator appointed through a collective bargaining agreement, or the Comptroller General.

2. An "unjustified or unwarranted personnel action" means any act of commission or omission by an authorized agency official which is in violation of a nondiscretionary requirement, whether that requirement is found in a law, regulation, Executive order, Civil Service Commission requirement, agency personnel policy manual, or negotiated collective bargaining agreement.

3. "Resulted in the withdrawal," etc. means that the unjustified or unwarranted action must have directly caused the harm to the employee for which the employee seeks restitution. For example, a failure to consider an employee for a promotion when several other equally qualified candidates are under consideration as well, in violation of a binding agreement, is an unjustified or unwarranted personnel action. However, no backpay is warranted since it cannot be said that "but for" the wrongful action, the employee would have received the promotion.

4. "Withdrawal or reduction of all or a part of pay," etc., includes failure to give the benefit in question in the first place in which there was a mandatory requirement that such benefit be granted to a specific employee.

5. The term "pay, allowances, or differentials" includes, in addition to the usual salary and premium pay benefits in the present regulations, a number of monetary benefits which are the usual perquisites of Federal employment. Thus, annual and sick leave and health insurance benefits, for example, could be included in a make-whole award; but benefits not directly attributable to a person's status as a Federal employee would not (e.g., access to public transportation, making a car unnecessary).

TEXT OF HEALTH INSURANCE FOR RESTORED EMPLOYEES

The make-whole remedy concerning health insurance for reinstated employees who were improperly removed is governed by 5 U.S.C. 8908 (1970), which provides:

"§ 8908. Coverage of restored employee.

"An employee enrolled in a health benefits plan under this chapter who is removed or suspended without pay and later reinstated or restored to duty on the ground that the removal or suspension was unjustified or unwarranted may, at his option, enroll as a new employee or have his coverage restored, with appropriate adjustments made in contributions and claims, to the same extent and effect as though the removal or suspension had not taken place."

Civil Service Commission regulations implementing this statute are contained in paragraph S8-5, Federal Personnel Manual Supplement 890-1, Instruction 34, September 24, 1973, which reads:

"S8-5. RESTORATION TO DUTY AFTER ERRONEOUS REMOVAL OR SUSPENSION

"a. Employee election. The enrollment of an employee who is suspended without pay continues for up to 365 days in nonpay status, as stated in S8-4a. The enrollment of an employee who is removed is terminated at the end of the pay period in which he is removed. If the enrollment of an employee who was removed or suspended without pay was terminated, and the employee is ordered restored to duty on the grounds that the suspension or removal was unwarranted or unjustified, he may elect either to (1) have his prior enrollment reinstated retroactive to the date it was terminated, or (2) enroll in the plan and option of his choice, the same as a new employee.

"b. Reinstatement of enrollment. If the employee elects to have his prior enrollment reinstated retroactively, withholdings and contributions must also be made retroactively just as though the erroneous suspension or removal had not taken place. His health benefits coverage is considered to have been continuously in effect, and he and any covered family members will be retroactively entitled to the full benefits of his plan.

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"c. New enrollment. If the employee elects to enroll instead of having his prior enrollment reinstated, his enrollment would be effective as stated in S7-2b. He is not retroactively entitled to benefits from his plan and no retroactive withholdings and contributions should be made.

"d. Notice to employees. An employee ordered restored to duty after erroneous removal or suspension should be notified of the choices open to him regarding his health benefits coverage. He also should be advised that if he elects to enroll as a new employee, the period of his suspension or removal (during which his enrollment was not in effect) will not be considered as an interruption to his continuous enrollment for purposes of continuing enrollment after retirement, provided he enrolls within 31 days after the date he is ordered restored to duty."

PARTIAL TEXT OF GOVERNMENT LIFE INSURANCE FOR RESTORED EMPLOYEES

The make-whole remedy regarding Government life insurance for a Government employee who is reinstated on the basis of a finding that the employee had undergone an unjustified personnel action is covered by 5 U.S.C. 8706(f) (supp. III, 1973) and provides:

"(f) If the insurance of an employee stops because of separation from the sevice or suspension without pay, and the separation or suspension is thereafter officially found to have been erroneous, the employee is deemed to have been insured during the period of erroneous separation or suspension. Deductions otherwise required by section 8707 of this chapter shall not be withheld from any backpay awarded for the period of separation or suspension unless death or accidental dismemberment of the employee occurs during such period."

Civil Service Commission regulations implementing this statute are contained in paragraph S4-2e, Federal Personnel Manual Supplement 870-1, Instruction 14, September 12, 1973, and provide:

"e. Restoration after erroneous suspension or removal. Effective on or after October 21, 1972, if an employee is retroactively restored to duty with pay after an erroneous suspension or removal, there will be no life insurance withholdings made from the retroactive pay adjustment for the period of suspension or removal. However, if death or accidental dismemberment occurs during the period between the employee's removal and the finding that the separation or suspension was erroneous, insurance proceeds will be paid and premiums will be withheld from back pay awarded for the period of separation or suspension. Where payment of back pay was made before October 21, 1972, withholdings for the period of suspension or removal must be made from the pay adjustment."

PARTIAL TEXT OF SF .CIAL ACCUMULATION OF ANNUAL LEAVE

A new make-whole remedy was provided by enactment of Public Law 93-181 on December 14, 1973 (codified at 5 U.S.C. 6304(d), (supp. III, 1973)); it permits the restoration of annual leave that is lost to an employee, through no fault of the employee, because of administrative error, exigencies of p· ic business, or sickness. Section 6304(d) provides:

"§ 6304. Annual leave; accumulation.

* * * * *

"(d)(1) Annual leave which is lost by operation of this secton because of--

"(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

"(B) exigencies of the public business when the annual leave was scheduled in advance; or

"(C) sickness of the employee when the annual leave was scheduled in advance:

"shall be restored to the employee.

"(2) Annual leave restored under paragraph (1) of this subsection, or under clause (2) of section 5562(a) of this title, which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Civil Service Commission. Leave credited under this paragraph but unused and still available to the employee under the regulations prescribed by the Commission shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title."

The Civil Service Commission has promulgated regulations and guidelines for implementing the above-quoted statute in Federal Personnel Manual Letter 630-22, January 11, 1974. The Commission guidelines state that "administration error" as utilized in 5 U.S.C. 6304(d)(1)(A) does not include unjustified or unwarranted personnel actions pursuant to U.S.C. 5596. In this regard, 5 U.S.C. 5596(B)(2) contains recredit authority for unjustified and unwarranted personnel actions.